THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

WAEL B. HALLAQ

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521803328

This page intentionally left blank

THE ORIGINS AND EVOLUTION OF ISLAMIC LAW

Long before the rise of Islam in the early seventh century, Arabia had come to form an integral part of the Near East. This book, covering more than three centuries of legal history, presents an important account of how Islam developed its own law while drawing on ancient Near Eastern legal cultures, Arabian customary law and Quranic reform. The development of the judiciary, legal reasoning and legal authority during the first century is discussed in detail as is the dramatic rise of Prophetic authority, the crystallization of legal theory and the formation of the all-important legal schools. Finally, the book explores the interplay between law and politics, explaining how the jurists and the ruling elite led a symbiotic existence and mutual dependency that – seemingly paradoxically – allowed Islamic law and its application to be uniquely independent of the "state."

Wael B. Hallaq is a James McGill Professor of Islamic Law, teaching at the Institute of Islamic Studies, McGill University. He is the author of *Ibn Taymiyya Against the Greek Logicians* (1993), *A History of Islamic Legal Theories* (1997) and *Authority, Continuity and Change in Islamic Law* (2001).

THEMES IN ISLAMIC LAW I

Series editor: Wael B. Hallaq

Themes in Islamic Law offers a series of state-of-the-art titles on the history of Islamic law, its application and its place in the modern world. The intention is to provide an analytic overview of the field with an emphasis on how law relates to the society in which it operates. Contributing authors, who all have distinguished reputations in their particular areas of scholarship, have been asked to interpret the complexities of the subject for those entering the field for the first time.

THE ORIGINS AND EVOLUTION OF ISLAMIC LAW

WAEL B. HALLAQ
McGill University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521803328

First published in print format 2004

ISBN-13 978-0-511-26407-8 eBook (EBL)
ISBN-10 0-511-26407-0 eBook (EBL)

ISBN-13 978-0-521-80332-8 hardback
ISBN-10 0-521-80332-2 hardback

ISBN-13 978-0-521-00580-7 paperback
ISBN-10 0-521-00580-9 paperback

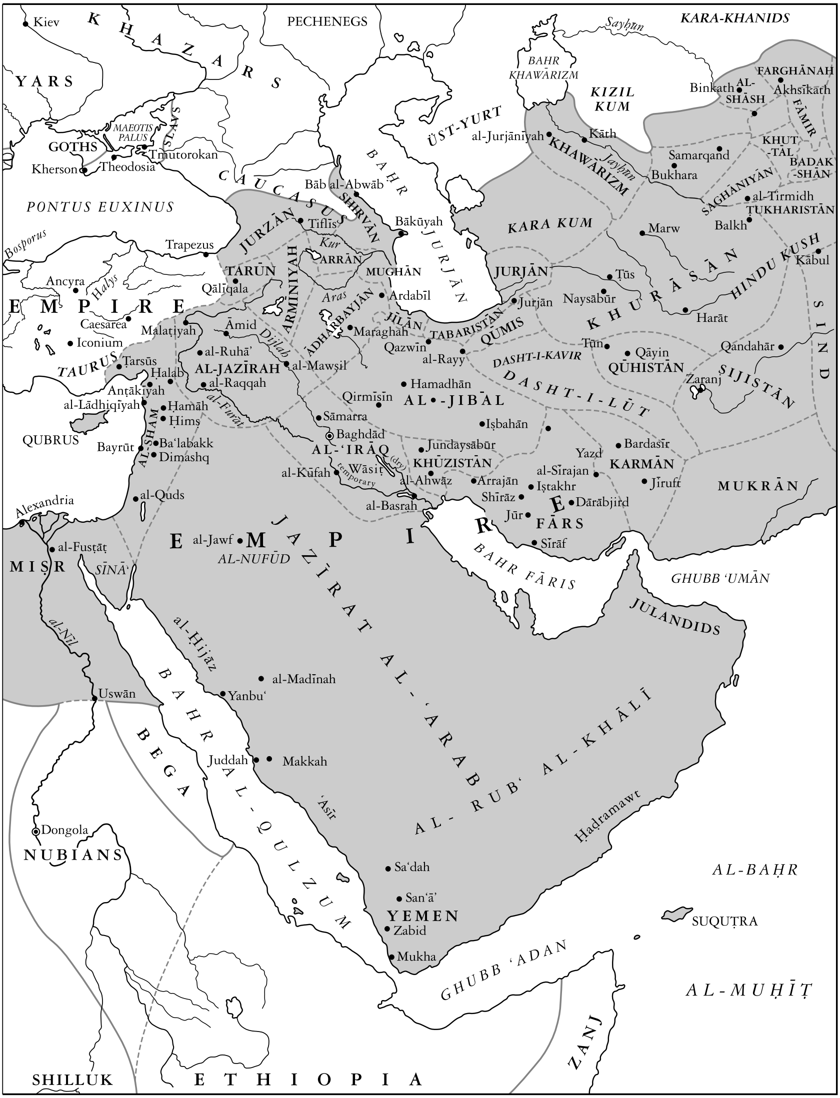
To Charry

Contents

Maps

1 Arabia ca. 622 AD

2 Muslim lands in the third/ninth century



Kiev
KHAZARS
PECHENEGS
KARA-KHANIDS
Sayhūn
YARS
BAHR KHAWĀRIZM
KIZIL KUM
FARGHĀNAH
AL-SHĀSH
Binkath
Akhsīkath
PĀMIR
ÜST-YURT
MAEOTIS PALUS
SLAVS
GOTHS
Tmutorokan
Kherson
Theodosia
al-Jurjānīyah
Kāth
KHAWĀRIZM
Jayhūn
Samarqand
KHUT-TAL
BADAK-SHĀN
Bukhara
CAUCASUS
BAHR
Bāb al-Abwāb
SAGHANIYĀN
al-Tirmidh
TUKHARISTĀN
PONTUS EUXINUS
SHIRVĀN
Bākūyah
JURJĀN
KARA KUM
Balkh
Marw
Bosporus
JURZĀN
Tiflīs
Kur
Trapezus
ARRĀN
TARŪN
ARMINIYAH
MUGHĀN
JURJĀN
Ṭūs
HINDU KUSH
Kābul
Ancyra
Halys
Qālīqala
Ardabīl
Aras
Jurjān
Naysābūr
KHURĀSĀN
EMPIRE
Caesarea
Malaṭiyah
Āmid
ADHARBAYJĀN
Maraghah
JĪLĀN
TABARISTĀN
QŪMIS
Harāt
SIND
Iconium
Dijlah
al-Ruhā'
Qazwīn
al-Rayy
DASHT-I-KAVIR
Ṭūn
Qāyin
Qandahār
TAURUS
Ṭarsūs
AL-JAZĪRAH
al-Mawṣil
QŪHISTĀN
SIJISTĀN
Halab
al-Raqqah
Hamadhān
DASHT-I-LŪT
Zaranj
Anṭākiyah
al-Furāt
al-Lādhiqīyah
Ḥamāh
Qirmīsīn
AL-JIBĀL
Ḥims
AL-SHĀM
Sāmarra
Iṣbahān
QUBRUS
Baghdād
Ba'labakk
Bayrūt
Dimashq
AL-'IRĀQ
(dry)
Jundaysābūr
Bardasīr
KHŪZISTĀN
Yazd
KARMĀN
al-Kūfah
Wāsiṭ
temporary
al-Ahwāz
Arrajān
al-Sīrajan
Iṣtakhr
Jīruft
MUKRĀN
al-Quds
Shīrāz
Alexandria
al-Basrah
Dārābjird
Jūr
FĀRS
al-Fusṭāṭ
al-Jawf
Sīrāf
MIṢR
SĪNĀ'
AL-NUFŪD
BAHR FĀRIS
GHUBB 'UMĀN
JAZĪRAT AL-'ARAB
JULANDIDS
al-Nīl
al-Ḥijāz
al-Madīnah
Uswān
Yanbu'
BAHR AL-QULZUM
BEGA
AL-RUB' AL-KHĀLĪ
Juddah
Makkah
'Asīr
Ḥaḍramawt
Dongola
NUBIANS
Sa'dah
AL-BAḤR
San'ā'
YEMEN
SUQUṬRA
Zabid
Mukha
GHUBB 'ADAN
AL-MUḤĪṬ
ZANJ
SHILLUK
ETHIOPIA

Introduction

One of the fundamental features of the so-called modern Islamic resurgence is the call to restore the Sharīʿa, the religious law of Islam. During the past two and a half decades, this call has grown ever more forceful, generating religious movements, a vast amount of literature, and affecting world politics. There is no doubt that Islamic law is today a significant cornerstone in the reaffirmation of Islamic identity, not only as a matter of positive law but also, and more importantly, as the foundation of a cultural uniqueness. Indeed, for many of today's Muslims, to live by Islamic law is not merely a legal issue, but one that is distinctly psychological.

The increasing importance of Islamic law in the Muslim world since the late 1970s and early 1980s has generated in western academia a renewed interest in this field, which had attracted only peripheral scholarly interest during the preceding decades. And even though the formative and modern periods were, and continue to be, two of the most studied epochs in the history of Islamic law, they remain comparatively unexplored. Worse still is the state of scholarship on the intervening periods, which continue to be a virtual *terra incognita*.[1]

An index of the state of scholarship on the formative period is the fact that, to date, there has not been a single volume published that offers a history of Islamic law during the first three or four centuries of its life. At least three works have thus far appeared bearing titles that contain the designation "Origins," in one way or another associated in these same titles with "Islamic law" or "Islamic jurisprudence."[2] None, however, can boast

[1] For analysis of the selective interests of modern scholarship and their political implications, see Wael Hallaq, "The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse," *UCLA Journal of Islamic and Near Eastern Law*, 2, 1 (2002–03): 1–31. See also the introduction in Wael Hallaq, ed., *The Formation of Islamic Law*, in Lawrence I. Conrad, ed., *The Formation of the Classical Islamic World*, vol. XXVII (Aldershot: Ashgate Publishing, 2003).

[2] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950); Harald Motzki, *Die Anfänge der islamischen Jurisprudenz: Ihr Entwicklung in Mekka bis zur Mitte*

content that truly reflects what is implied in these titles, all three volumes being specialized studies that – however meritorious some of them may be – endeavor to study the formative period through a rather narrow lens.

Although the main contours of legal development during the formative period can be culled from existing primary sources, there is much that remains unexplored. The quality of the sources from the first centuries of Islam is historiographically problematic, but even if this problem did not exist, we would still find that these sources remain quantitatively insufficient. For example, we possess no court records or any other source that can inform us of how the judiciary operated during the formative period, or what went on in courts of law. We have no clear idea of the types of problems that were litigated, how they were resolved, what legal doctrines were applied, how the parties represented themselves, how accessible courts were for women, how the judges used social and/or tribal ties to negotiate and solve disputes, and so forth. Thus, none of these issues can be addressed here in a comprehensive fashion, if at all. In line with the introductory nature of the present series, I attempt in this volume to sketch the outlines of the formative period, presenting a general survey of the main issues that contributed significantly to the formation of Islamic law. And it is in this general coverage that the present work differs from its above-mentioned predecessors, which offer topical or partial treatments rather than a synthesized picture of formative legal development.

Crucial to the present endeavor is the definition of a formative period. What is it that distinguishes a formative era from other historical periods? More specifically in our context, what are the criteria through which we can identify the formative period in Islamic law? Until recently, it has been thought that this period ended around the middle of the third century H (ca. 860 AD), when, following Joseph Schacht's findings, we thought that the all-important legal schools, as personal juristic entities, had come into existence and that, again after Schacht, Islamic law and legal theory had come of age. More recent research, however, has shown that Schacht's findings were largely incorrect and that the point at which Islamic law came to contain all its major components must be dated to around the middle of the fourth/tenth century, an entire century later than had originally been assumed. For our purposes, I define the "formative period" as that historical period in which the legal system arose from rudimentary beginnings

des 2./8. Jahrhunderts (Stuttgart: Franz Steiner, 1991), trans. Marion H. Katz, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools* (Leiden: Brill, 2002); and Y. Dutton, *The Origins of Islamic Law: The Qur'an, the Muwaṭṭa' and Medinan 'Amal* (Richmond: Curzon, 1999).

and then developed to the point at which its constitutive features had acquired an identifiable shape.

I say "identifiable" because all that is needed in the context of "formation" is the coming into existence of those attributes that distinguish and make unmistakably clear the constitutive features of that system. The notion of "formation," therefore, would have to be restricted to the evolution of the general features of the system, since the details – or what we might, philosophically speaking, call "accidental attributes" – endured constant movement and change. Thus, and to continue with our philosophical terminology, formation must be defined in terms of "essential attributes" which make a thing what it is; or, conversely, the absence of any essential attribute would alter the very nature of the thing, rendering it qualitatively different from another in which that attribute does exist. In the case of Islamic law, the essential attributes – those that gave it its shape – were four: (1) the evolution of a complete judiciary, with a full-fledged court system and law of evidence and procedure; (2) the full elaboration of a positive legal doctrine; (3) the full emergence of a science of legal methodology and interpretation which reflected, among other things, a large measure of hermeneutical, intellectual and juristic self-consciousness; and (4) the full emergence of the doctrinal legal schools, a cardinal development that in turn presupposed the emergence of various systemic, juristic, educational and practice-based elements. (Any other essential attribute, such as, e.g., the religious character of the law, must ultimately and derivatively fall under one or more of these four.)

By the middle of the third/ninth century, the third and fourth attributes had not yet developed into anything like their complete form. By the middle of the fourth/tenth century, however, all of them had. And this is the cut-off point. All later developments, including change in legal doctrine or practice, were "accidental attributes" that – despite their importance for legal, social and other historians – did not affect the constitution of the phenomenon we call Islamic law. With or without these changes, Islamic law, for our present purposes, would have remained Islamic law, but without the legal schools or the science of legal theory, Islamic law cannot be deemed, in hindsight, complete.

Far more complex than plotting the end-point of the formative period is the determination of its beginning. It is no exaggeration to say that of all the major questions in Islamic legal history, the issues involved in studying these beginnings have proved the most challenging. The problems associated with "beginnings" have for long stemmed more from unproven assumptions than from any real historical evidence. Hence, the classic

Orientalist creed that the Arabia of the Prophet was a culturally impoverished region, and that when the Arabs built their sophisticated cities, empires and legal systems, they could not have drawn on their own vacuous cultural resources. Instead, it is maintained, they freely absorbed the cultural elements of the societies they eventually conquered, including (but especially) the Byzantino-Roman and Sasanid civilizations. In this account, Syria and Iraq become the loci of legal transmission.

These assumptions have consistently failed to stand the test of scrutiny, as recent research has shown. Except in a few cases, attempts to demonstrate genetic links with these cultures have proved futile, if only because Arabia has provided an equally, if not more, convincing source for much of the law that Islam came to adopt. Chapter 1, therefore, attempts to provide a more balanced account of pre-Islamic Arabia as a region that was an integral part of the general culture of the Near East. Through intensive contacts with the northern Arabs who dominated the Fertile Crescent during the centuries before the rise of Islam, the Peninsular Arabs maintained forms of culture that were closely linked to those prevailing in the north. The Bedouins themselves were to some extent part of this cultural map, but the sedentary and agricultural settlements of the Hejaz were even more dynamic participants in the commercial and religious activities of the Near East. Through trade, missionary activities, and northern tribal connections (and hence the constant shifting of demographic boundaries), their inhabitants knew Syria and Mesopotamia as well as the inhabitants of the latter did the Hejaz. When Muhammad embarked on his mission of establishing a new religion and building a state, he and his collaborators were well acquainted not only with the political and military problems of the Fertile Crescent, but also with its cultures and much of its law. While law as a doctrine and legal system does not appear to have been on the Prophet's mind during most of his career, the elaboration of a particularly Islamic conception of law did begin to emerge a few years before his death. The legal contents of the Quran, viewed in the larger context of already established Jewish law and the ancient Semitic–Mesopotamian legal traditions, provide plentiful evidence of this rising conception.

During the first decades after the Prophet's death, an Islamic polity took shape, guided by both the Quranic legal ethic and the customary laws of the Peninsular Arabs – laws that underwent a gradual transformation under the influence of emerging religious values. Chapter 2 provides a sketch of the evolving legal culture as reflected in the transformations that took place in the office of the proto-*qāḍī*s, the earliest quasi-judges of Islam. The increasing specialization of this office as a judicial function represents

an index of the evolution of an Islamic legal ethic, signified by the concomitant rise of Prophetic authority. Chapter 3 continues this theme by exploring the emergence of the so-called legal specialists, a group of men who in their private lives elaborated a legal doctrine that became the juristic foundation of legal practice. With the rise of the class of legal specialists at the end of the first century H and the beginning of the next (ca. 700–40), there again occurred a concomitant development in the construction of Prophetic authority, represented by the emergence of *ḥadīth*, the verbal expression of the Prophetic model. Chapters 2 and 3 thus explain, among other things, how Prophetic authority was to emerge out of the ideas of social consensus and the model behavior (*sunna*; pl. *sunan*) of the tribal and garrison societies that contributed to the first stage of empire-building.

Chapter 4, which takes up the next stage of judicial development, describes the process through which the Muslim court, as part of the empire's structure, acquired its final shape, in which all its essential features came into existence in developed forms. Chapter 5 treats jurisprudential changes that occurred parallel to the developments in the judiciary described in the previous chapter. Here, we return to the changing dynamics of legal authority, which marked a further, but still gradual, shift from what we have called sunnaic practice to a staggering proliferation of Prophetic *ḥadīth*. In this chapter, we also describe the relationship between these competing sources of the law and the positive concepts of consensus, *ijtihād* and *ra'y*. A discussion of the changing relationship between the latter two also illustrates the evolving dynamic of legal reasoning toward stricter and more systematic procedures.

By the end of the second/eighth century, all essential features of the judiciary and positive legal doctrine had clearly acquired a highly developed form, only to undergo further refinements, *mutatis mutandis*, throughout the centuries thereafter. But legal theory, the so-called *uṣūl al-fiqh*, remained in embryo, still struggling to take shape. Indeed, the competing movements of the rationalists and the traditionalists (initially discussed in chapter 3, section 4) would have to settle on a compromise before such a theory – which ultimately came to define Sunnite Islam itself – could emerge. Chapter 6 examines what I have called the Great Rationalist–Traditionalist Synthesis, and how legal theory emerged out of it. The remainder of this chapter offers an outline of this theory as it stood during the second half of the fourth/tenth century.

Chapter 7 offers an account of the rise of doctrinal legal schools (*madhhab*s), the last feature of Islamic law to develop. These schools originally

emerged out of the scholarly circles of legal specialists, going through a middle stage dominated by what I have termed "personal schools" (a designation mistakenly used by some scholars to refer to what I in this monograph have characterized as doctrinal schools). In this chapter, I also attempt to explain why only four legal schools survived, and why the others failed to do so. It will become obvious that the success of the four schools, as well as their evolution to the final stage of doctrinal schools, was partly connected with a particular relationship that existed between law and the legal profession, on the one hand, and the political, ruling elite, on the other. Although this chapter completes the account of the formation of Islamic law in all its constitutive elements, this relationship between law and politics remains in want of further analysis, and this I take up in the eighth and final chapter. Here, I discuss the relative independence of positive law from government, and the symbiotic relationship that existed on the basis of mutual interests between the legal profession and those wielding political power. Despite all of the attempts of the latter to manipulate the law, classical Islam, in my view, offered a prime case of the rule of law. To say that the caliphs, rulers and their proxies ultimately fell under the imperatives of the religious law is merely to state the obvious. Yet, it is undeniable that political authority and power did affect the evolution of certain aspects of law, especially the direction in which the legal schools developed and were shaped. The reader, therefore, may find it beneficial to review chapter 7 after having read chapter 8. Finally, the conclusion offers a summary of the main issues raised in this volume, with a view to providing a synthetic account of how these issues contributed to the formation of Islamic law.

One further remark about calendars. This book uses a dual system of dating: one is the Muslim Hijri calendar, the other Gregorian (e.g., 166/782). To omit the former would deprive the reader of the sense of relativity of time in Muslim history; and to omit the latter would probably aggravate the problem even further (and in other ways to boot). I have therefore thought it judicious to use both calendars. But this method has its own problems, hence the following caveat: In this work, it is often stated that this or that event occurred, for example, "at the end of the second/eighth century." In fact, the end of that Hijri century, say 190–200, corresponds to 805 to 815 AD, i.e., the beginning of the ninth century AD. Stylistically, it would be awkward consistently to render the Gregorian equivalent of the approximate Hijri date numerically. So the reader is advised that in such contexts, the Gregorian dates in this book are provided merely as guidelines, whereas the Hijri calendar reflects the

more accurate dating. However, the reader will do well to keep in mind that the ends of the first three Hijri centuries roughly correspond to an average of a decade and a half in the beginning of each of the eighth, ninth and tenth centuries AD.

CHAPTER 1

The pre-Islamic Near East, Muḥammad and Quranic law

1. THE GENERAL NEAR EASTERN BACKGROUND

It was in the Hejazi cities of Mecca and Yathrib – later renamed Medina – that a man called Muḥammad came forward to proclaim a new religion with a political order at its center. By the time of his death in 11/632, he had left behind a small state and clear notions of justice, but with underdeveloped ideas of law and an even less developed judiciary. Soon, however, Islam was to conquer lands east and west, ranging from western China to the Iberian peninsula. Along with this territorial expansion, the new religion generated a full-fledged, sophisticated law and legal system in the short span of the three-and-a-half centuries that followed its inception.

By the time of Muḥammad, Mecca and its northern neighbor Yathrib had known a long history of settlement and were largely a part of the cultural continuum that had dominated the Near East since the time of the Sumerians. True, the two cities were not direct participants in the empire cultures that prevailed elsewhere in the Near East, but they were tied to them in more ways than one. Prior to the Arab expansion in the name of Islam, Arabian society had developed the same types of institutions and forms of culture that were established in the imperial societies to the south and north, a development that would later facilitate the Arab conquest of this region. This conquest, as one historian put it, "helped to complete the assimilation of the conquering peoples, begun in Arabia, into general Middle Eastern society."[1] It was these societies and cultures that provided the larger context in which Islam, as a legal phenomenon, was to grow. This context, however, was only to become relevant much later, as we shall see in due course.

[1] Ira M. Lapidus, "The Arab Conquests and the Formation of Islamic Society," in G. H. A. Juynboll, ed., *Studies on the First Century of Islamic Society* (Carbondale and Edwardsville: Southern Illinois University Press, 1982), 50.

In the century or so before the rise of Islam, there existed three centers of empire: the Byzantine in the north-west, the Sasanid in the north-east and the Yemenite in the south. This latter was subsidiary to the former two by virtue of being, at different times, either a vassal state of the Ethiopian kingdom – which in turn was a constant ally of the Eastern Roman Empire – or under the direct occupation of the Sasanids. But early on the Yemen had experienced a long history of independent kingdoms that attained a high level of civilization. It possessed a strategic commercial position, lying on the ancient trade route from the Indonesian Archipelago and India to Syria. Spices, incense, leather, silk, ivory, gold, silver, glue and precious stones were among the many items that made their way through the Yemen to Pharaonic Egypt and later to the Greek, Roman and Byzantine Empires. The Maʿīnite, Saba'ite and Ḥimyarite kingdoms that flourished in the Yemen developed a sedentary style of life and governance, and an elaborate urban existence complete with markets, palaces and imposing houses, supported by sophisticated agrarian and commercial networks.

In 525 AD, eight decades before the rise of Islam, the Abyssinians occupied the Yemen and brought an end to the Ḥimyarite kingdom, ruled at the time by the Jewish monarch Dhū Nuwās. On the surface, and probably for propaganda reasons, the occupation was made to appear as a retaliatory measure against the oppressive religious policies of this king, who persecuted the Christians of the Yemen, especially those at Najrān. However, underlying this conquest were the commercial interests of both the Ethiopians and the Byzantines. Thus, although the Yemenite ruling elite soon acquired independence, it remained nominally a vassal province of the Abyssinian kingdom. In 570 AD, close to the time of Muḥammad's birth, the Christian Abraha launched a military campaign with a view towards subduing the Hejaz, a campaign that seems to have been dictated by a broader Byzantine policy to secure the trade routes from India to the Syrian territories in the north. The decimation of the Ḥimyarites was only the first step in the process. The subjugation of the Arabian trading tribes in the Hejaz, especially at Mecca, was supposed to be the second.

The latter scheme, however, reportedly fell apart when disease wrought havoc with Abraha's military campaign, and sent it back to the Yemen in ruins. This setback signaled the end of Abraha's rule, and with it the hegemony of the Abyssinian kingdom over the Yemen. In 575 AD, the Sasanids conquered the country and restored to the throne the descendants of Dhū Yazan. Their rule, however, did not last for long: by the end of the

century or the very beginning of the seventh, the Yemen was ruled exclusively by Sasanid governors who initiated a policy of rebuilding the country and restoring the economic networks that linked its cities.

The Sasanid occupation of the Yemen was an extension of their imperial policies, begun three centuries earlier in the lands that bordered on theirs and on the Byzantine vassal state of the Ghassānids. In southern and western Iraq, they set up an autonomous state headed by the Lakhmid kings to rule Ḥīra, a major city on the west side of the Euphrates. Opposite this, and competing bitterly with the Sasanids, stood the Roman and, later, Byzantine Empires which relied on the Ghassānids to do their bidding against their arch-enemy and to protect their interests in this region. The Ghassānids set up their state at Busra Askisham in the Ḥūrān region, and Palmyra functioned, for all practical purposes, as their second capital.

It was not a coincidence that both the Ghassānids and the Lakhmids were chosen for their respective roles as vassal kingdoms. As southern tribal confederations, they had a long experience with citied life, high civilization and, like all urban populations, obedience to central authority. Both originally came from the eastern parts of the Yemen which, since the second or third century BC, if not earlier, had enjoyed a high level of culture, complex forms of political life and knowledge of agriculture, trade and commerce. Ḥīra, the Lakhmid capital, was a center of the fine arts, science (particularly medicine), architecture and literature. It had been the recipient of massive Arab migration since the first century AD, when the Azd, a constituent group of the Tanūkh confederation, settled its surrounding area. Ḥīra and its hinterland boasted a rich agriculturalist and commercial economy, exclusively controlled by the Lakhmid tribal confederation. It manufactured leather and steel armor, and produced all sorts of cotton, wool and linen textiles. The Lakhmids had adopted Christianity at an early date, perhaps as early as the fourth century AD, and although the majority of the inhabitants of Ḥīra and of the surrounding areas appear to have adopted the Nestorian version (especially ʿAbd Qays, Tamīm and Bakr b. Wā'il), there were many who were Jacobites, as well as a considerable number of Magians, Zoroastrians, Jews and pagans.[2]

Like the Lakhmids, the Ghassānids were also southern tribes who migrated to the Syrian north during the early part of the sixth century AD, having succeeded other tribal confederations that had settled in the area after the collapse of the Nabatean kingdom. Granted the title of king by the

[2] D. T. Potts, *The Arabian Gulf in Antiquity*, 2 vols. (Oxford: Clarendon Press, 1990), I, 242. See also M. J. Kister, "Al-Ḥīra: Some Notes on its Relations with Arabia," *Arabica*, 15 (1968): 143–69.

Byzantine emperor Justinian, the Ghassānid chief Arethas (al-Ḥārith b. Jabala; r. 529–69 AD) and his successors continued to battle their imperial counterparts, the Lakhmids, until shortly before the Islamic conquests. And like their enemies in Ḥīra, they constructed a sophisticated agriculturalist economy and an active trade network, and engaged in the manufacture of a variety of products. Culturally and religiously, they were (as might be expected) influenced by the Roman–Byzantine heritage, but the discovery of Sasanid architectural forms in local archaeological excavations hints at influence on the part of the empire to the east.

Between the Byzantine and Sasanid empires, in the north, west and center of the Peninsula, lay a vast area inhabited by Arabian Bedouin whose lifestyle greatly depended on what Hodgson called "camel-nomadism."[3] This area was arid, affording little rain and, consequently, sparse vegetation. The steppes were dotted with oases where the agriculturalists could produce wheat, grapes, dates and other foodstuffs sufficient to sustain settlement and sedentary existence and to provide services for the passing caravans. The domestication and exploitation of the camel, which the Bedouin mastered like no one else, became a well-established feature of Arabian life no later than the first century AD. But camel-nomadism could not have existed, and certainly could not have flourished, without an agrarian economy which was, in a sense, its infrastructural support. The Bedouin tribes, as part of their normal activities, engaged in an extensive system of trade and commerce, a system that prevailed in the lands between the lower eastern Mediterranean and the Arabian Sea and between this latter and north-eastern Arabia. They provided passing caravans with camels, afforded them protective escorts, and themselves engaged in trade on a significant scale. And when none of these services were in demand, they simply raided the caravans, thereby making their services as protectors all the more valuable. The agriculturalists in turn depended to some extent on the resources afforded by camel-nomadism and by the commercial and trading activities based on the camel industry. The Bedouin and the agriculturalists, therefore, complemented each other, and the two forms of material existence constituted a sort of an economic ecology in the greater part of the Arabian Peninsula.[4]

[3] Marshall Hodgson, *The Venture of Islam: Conscience and History in a World Civilization*, 3 vols. (Chicago: University of Chicago Press, 1974), I, 147.

[4] Fred Donner, "The Role of Nomads in the Near East in Late Antiquity (400–800 C.E.)," in F. M. Clover and R. S. Humphreys, eds., *Tradition and Innovation in Late Antiquity* (Madison: University of Wisconsin Press, 1989), 73–88.

To be sure, the Bedouin played an important role in the life of the three polities that surrounded them. In the south, the large tribe of Kinda functioned as a vassal to the Ḥimyarites and later to the Sasanids. Its Bedouin members controlled the trade routes from the Yemen through Ḥaḍramawt and its ports, just as they controlled the routes that connected the Yemen and Ḥaḍramawt with the Najd territory.[5] The Lakhmids, fighting on behalf of their Sasanid overlords, had lost Bahrain to the Kinda between 450 and 530 AD. By the beginning of the seventh century AD, the Yemen and Ḥaḍramawt were predominantly Arabic speaking. In the northeast, the Arab migrations had already begun to displace Aramaic-speaking populations as early as the first century AD. East Arabian and North-East Arabian dialects gradually became dominant. Likewise, the entire area that lay between northern Arabia and Palmyra, including Edessa, was considerably, if not mostly, Arabic speaking on the eve of Islam's emergence. The spread of Arabic and the displacement of Aramaic was in good part due to the energetic work of the Bedouin Arabs as traders, caravanists and soldiers. In other words, the economic life of the two northern empires, the Byzantine and the Sasanid, was dependent on the Bedouin, who alone were able to cross the otherwise impenetrable terrains of the mostly arid Peninsula.[6]

The Bedouin Arabs were certainly in close contact with each other throughout the territory that they inhabited and roamed, from Syria to Iraq, and from Najd to the Hejaz, Ḥaḍramawt and the Yemen. Concomitant with the trade routes there also existed large fairs and markets which provided excellent opportunities for the recital of poetry and for orations and tales, in addition to the exchange of goods. Conducting their own markets in Ḥīra and its environs, the Lakhmids gave economic privileges to the Tamīm, whose noblemen were granted the right to supervise and control the markets. As part of this control, the tribes collected taxes, usually on the exchange and sale of goods. Tamīm's market, al-Mushaqqar, was held in what is now Hufūf, but their economic alliances extended far beyond the limits of Ḥīra, reaching as far as northern Najd and Mecca. These wide-ranging connections gave them unparalleled influence over Peninsular caravan traffic.[7]

[5] M. B. Piotrovsky, "Late Ancient and Early Medieval Yemen: Settlement, Traditions and Innovations," in G. R. D. King and Avril Cameron, eds., *The Byzantine and Early Islamic Near East*, vol. II (Princeton: The Darwin Press, 1994), 213–20, at 217.

[6] Potts, *Arabian Gulf*, I, 227; R. Dussaud, *La Pénétration des arabes en Syrie avant l'Islam* (Paris: Paul Geuthner, 1955).

[7] Potts, *Arabian Gulf*, I, 251.

In addition to the market in Dūmat al-Jandal in the northern Nufūd oasis, which may have been the oldest market of all,[8] there was another international market on the coast of Oman frequented by merchants from India and China, sailing through the Arabian Sea (Indian and Chinese merchant activity is also documented in excavations in Dibba, an island in the Persian Gulf, and in Chinese sources as well).[9] In eastern Ḥaḍramawt, Kinda controlled one of the largest markets of Arabia, known as the Tomb of the Prophet Hūd. They also controlled al-Rabiyya and al-Shiḥr, two famous markets, and imposed their own taxes there.[10] In Yathrib alone four markets were in operation before Islam appeared, two of which were owned and controlled by the Jews of the city (for other markets, see map 1).[11]

The markets of Arabia had a religious function as well. It appears that the location of the market was determined by the presence of a deity or an idol in the market itself or its vicinity. In fact, it may well have been that these markets began as religious festivals, acquiring a commercial dimension with the passage of time. The markets of Dūmat al-Jandal and ʿUkāẓ are cases in point.[12]

The nexus of this network of trade, markets and worship was Mecca, surely the most significant commercial center of western and central Arabia. Strategically located at the juncture of two intersecting trade routes, it was in contact with the Syrian and Iraqian north, with the Yemenite south, central and eastern Najd, and, through the Red Sea coastal area, with Abyssinia and eastern Africa. The city's involvement in trade had certainly started before the first century AD, when the Romans, through their vassals the Nabateans, were most active on the south–north trade

[8] ʿAbd al-Raḥmān al-Sudairī, *The Desert Frontier of Arabia: al-Jawf through the Ages* (London: Stacey International, 1995), 40–41.

[9] Potts, *Arabian Gulf*, II, 332, 339–40. On the basis of archaeological and other evidence, Potts casts doubt on earlier findings that there was no direct sailing between China and the Arabian Gulf. Recent excavations have also revealed contacts between the Gulf of Oman and Bactria and Margiana in Central Baluchistan. See also E. C. L. During Caspers, "Further Evidence for 'Central Asian' Materials from the Arabian Gulf," *Journal of the Economic and Social History of the Orient*, 37 (1994): 33–53. For trading with the Chinese during the fifth century, from both Aden and the mouth of the Euphrates, see J. Levenson, *European Expansion and the Counter-Example of Asia, 1300–1600* (Englewood Cliffs, N.J.: Prentice Hall, 1967), 11, on the authority of Joseph Needham, *Science and Civilization in China*, vol. I (Cambridge: Cambridge University Press, 1954), 179–80.

[10] Piotrovsky, "Late Ancient Yemen," 217.

[11] M. Lecker, "On the Markets of Medina (Yathrib) in Pre-Islamic and Early Islamic Times," in M. Lecker, *Jews and Arabs in Pre- and Early Islamic Arabia* (Aldershot: Variorum, 1998), article IX, 63 ff.

[12] Jawād ʿAlī, *al-Mufaṣṣal fī Tārīkh al-ʿArab Qabl al-Islām*, 10 vols. (Beirut: Dār al-ʿIlm lil-Malāyīn, 1970–76), VII, 371–73, 382–84; al-Sudairī, *Desert Frontier*, 41.

route. Archaeological excavations show that imperial forces had vested interests in the Hejaz, which they attempted to penetrate militarily more than once, but without success. Julius Galus' failed campaign was only the most notorious. The Hejaz nonetheless appears to have been a cultural satellite of the Nabatean Arabs, as evidenced by the fact that the people of the region adopted Nabatean Arabic for writing and worshiped major Nabatean deities, such as Hubal, Manāt and al-Lāt, all of whom came to play a significant role in the religious life of Mecca and Yathrib, a role that Muḥammad continued to battle until the end of his days. But the Hejaz was also a commercial satellite of the Nabateans and focus of their trade, and various pecuniary contracts related, among other things, to the sale of wheat, raisins and barley – contracts whose forms were to survive into Islam.[13]

The Quraysh, the tribal confederation at Mecca, under the leadership of a certain enterprising Quṣayy, managed to construct an active network of regional trade that connected the Peninsula with a larger international system. The Quraysh struck treaties with several other tribal confederations, including the Hudhayl and Thaqīf in the Yamāma (especially the Thaqīf of the neighboring town of Ṭā'if), the 'Abd Qays in eastern Najd, the Lakhmids of Ḥīra, the Ghassānids of Syria and the Ḥimyarites and their successors in the Yemen. The strategic role of Mecca permitted the Quraysh to levy taxes on passing caravans, especially those that did not benefit from previously concluded treaties of cooperation. The commodities that wended their way through Mecca included, among other things, wheat, barley, oils, wine, gold, silver, ivory, precious stones, sandalwood, incense, spices, silk and cotton textiles and leather. Basic local production of light weaponry (mainly swords) and pottery must have contributed modestly to the otherwise intense commercial activity.

Mecca gained a prominent position in the Peninsula for engaging in other, non-commercial activity, although the latter could not always be separated from the business of trading. In addition to literary contests and prestigious poetic fairs, Mecca had for long boasted the Ka'ba as a place of worship, and by the sixth century AD it seems to have become the most important destination for pilgrimage in the Peninsula, surpassing in prestige all the other *ka'ba*s found throughout the territory. To secure

[13] See, e.g., Muwaffaq al-Dīn Ibn Qudāma, *Mughnī*, 14 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1973), IV, 312. See also, more generally, C. Edens and Garth Bawden, "History of Taymā' and Hejazi Trade during the First Millennium BC," *Journal of the Economic and Social History of the Orient*, 32 (1989): 48–97.

traffic to Mecca from all quarters of the Peninsula, the Quraysh established a calendar that was widely accepted by the other tribes. Four months of the year were designated as *ḥarām*, which meant that during one-third of every year no violence was permitted. And this seems to have been normative, with violations being rare indeed. Maintaining order in this fashion enabled the Quraysh to gain economic power and a social and religious status seldom equaled in Arabia.

A commercial, religious and literary center, Mecca was connected not only with every major tribe and locale in the Peninsula, but also with the Near East at large. Its commercial relations with the Lakhmids, Tamīm and ʿAbd Qays placed it in indirect contact with the culture of Sasan, and even of the Orient, India and Central Asia; its relations with the Ghassānids and their predecessors brought to Mecca elements of Roman and Byzantine cultures; its close contact with Abyssinia exposed it to East Africa; and the Yemen mediated its familiarity with aspects of Indian culture. As a result of this hybridity, Meccan society was unusual in Arabia, featuring in its ranks non-tribal members and foreigners who would otherwise have had no place in a strictly tribal social structure. Foreign merchants, African slaves, singing female slaves, wayfarers, the poor and downtrodden found their way to the city. A Byzantine merchant bearing the common name Anastasius (Arabicized as Nisṭās) is said to have journeyed to Mecca and taken up permanent residence there. He became the client (*mawlā*) of Ṣafwān b. Umayya, a status of artificial kinship created to accommodate an outsider within a given group. Another Byzantine citizen by the name of John was adopted as a client by Ṣuhayb al-Rūmī who, as his names indicates, was himself a Byzantine; he in turn was a *mawlā* of ʿAbd Allāh b. Jadʿān b. Kaʿb.[14] Mecca also hosted Egyptian Copts, Persians and Abyssinians. It was familiar with foreign cuisines, and ʿAbd Allāh b. Jadʿān himself – who appears to have been a prominent merchant – is credited with introducing culinary curiosities from the lands of Sasan. Furthermore, the Meccans themselves did not restrict their residence to the city: as merchants, they traveled far and wide and owned farms and houses in places as remote as Homs in Syria and the cities of the Yemen.

All this goes to show that the Peninsular Arabs were not mere nomads subsisting on a primitive desert economy. While there were tribes, such as certain clans of the Kinda, who did lead a nomadic lifestyle, the majority of

[14] See Sayyid Sālim, *Tārīkh al-ʿArab fī ʿAṣr al-Jāhiliyya* (Alexandria: Muʾassasat Shabāb al-Jāmiʿa, 1990), 360, on the authorities of Iṣbahānī and Ibn Hishām.

Bedouins, as we have seen, engaged in pastoral, agricultural and trading activities.[15] Evidence shows that most of Arabia was not entirely nomadic, and that there was no necessary relationship between tribal nomadism and a "primitive" lifestyle. Although Arabian society was almost exclusively tribal, it was at the same time largely sedentary. Eastern Arabia had several major oases: of these al-Aḥsāʾ was the largest; with its cultivated palm trees and gardens, it was sufficiently fertile to support settled life from Hellenistic times down to the early Islamic period. Similarly, in the areas of Hufūf, al-Qaṭīf and al-Mubarraz, and very likely in al-Qasīm and the valleys of Ṣudayr and al-ʿAriḍ, a sedentary lifestyle appears to have continued uninterrupted since ancient times.[16] There is also evidence to show that Bahrain and the Omani coast at Suḥār supported sedentary populations for centuries before Islam.[17] The mills of Oman make an appearance in written communications between the Prophet and Jaifar, the king of Julanda.[18] Archaeological evidence from al-Kharj and al-Aflāj in the south of Najd suggests a sophisticated irrigation system that was fully operational by the beginning of the seventh century AD. Archaeologists have shown that al-Maʿbiyyāt, Madāʾin Ṣāliḥ and al-Khurayba in the Hejaz had been centers of settlement since the second century AD. Furthermore, it is now established that inhabitants of the town of al-Rabadha, on the commercial and, later, pilgrimage route of Darb Zubayda, engaged in versatile economic activity, including camel husbandry, agriculture, and the manufacture of metal, glass and soapstone objects.[19] G. King suggests that the presence in this locale of glass-smelting and alkaline blue glaze wasters reflects the production there of this common ware, along with copper and bronze items and certain forms of ceramics.[20] From this evidence, King concludes:

> If a small town like al-Rabadha displays the continuous settlement that is indicated by the Saudi excavations, then there is a good reason to consider whether such village settlement was not more widespread in pre-Islamic and early Islamic times in western Arabia. The evidence of al-Rabadha demonstrates that in this region, past land use was not solely nomadic, and the level of village life demonstrated by

[15] Donner, "Role of Nomads in the Near East."
[16] G. R. D. King, "Settlement in Western and Central Arabia and the Gulf in the Sixth–Eighth Centuries AD," in G. R. D. King and A. Cameron, eds., *The Byzantine and Early Islamic Near East*, vol. II (Princeton: The Darwin Press, 1994), 181–212, at 184.
[17] Ibid., 210–11.
[18] Potts, *Arabian Gulf*, II, 342.
[19] On Darb Zubayda, see the remarkable study of Saad al-Rashid, *Darb Zubayda: The Pilgrim Road from Kufa to Mecca* (Riyadh: Riyadh University Libraries, 1980).
[20] King, "Settlement," 197–98.

the excavation gives new impression of the nature of society, the land and small-scale village manufacture in pre-Islamic and early Islamic times in this particular district.[21]

In many parts of Arabia, towns and villages sprang up around wells and oases. The fertile, rain-watered highlands from central Hejaz to the Yemen, for instance, were inhabited by sedentary populations. It is noteworthy that the Bedouin also formed part of these settlements, merging as it were with populations inside or around towns. Bedouin nobility took up permanent residence in some of these towns which over time fell under their domination. Indeed, even in large cities they often constituted an important part of the population. An example in point is Qaryat al-Faww, located on the trade route to the Yemen. Excavations have revealed that the city, with its market complex and dwelling quarters, was dominated by the tribes of Kinda, Qaḥṭān and Madhhij.[22] Just as the Ghassānid tribes merged with the local populations of Palmyra and Busra, and the Lakhmids with those of Ḥīra, so did many of their Najdite, Hejazite and Yemenite brothers come to settle in the towns and cities of the Peninsula and, with the passage of time, blend into their populations.

The picture that emerges is one of a dual culture in which sedentary populations coexisted and interacted with nomads and pastoralists, and where no clear lines could be drawn between the two. The Bedouin Arabs might settle on the fringes of a town, only to move away later, but they might just as easily penetrate the town and establish permanent roots in it. They might maintain their social structure of families and clans, or become fragmented and, like other urban families, continue to bear names after their fathers and grandfathers, or after a profession that a family member practiced. Therefore, when the sources speak of a clan in an urban setting, we cannot necessarily assume it to be a nomadic group, though it might have at one point originated as such.

It also emerges that Peninsular society led a dynamic existence, with direct and indirect ties to an international market of material goods and cultural and institutional products. Although the Peninsula's geographical conditions did not allow the full absorption of southern and northern empire institutions, it nonetheless received a level of culture and sorts of material products that played a part in Arabian sedentary life. The more archaeological excavations are undertaken, the more this picture is

[21] Ibid., 200.
[22] Piotrovsky, "Late Ancient Yemen," 216–17.

confirmed. The image of Arabia as an impoverished desert, empty save for primitive tribesmen roaming around and raiding each other, should be abandoned.[23]

Arabian society was in possession of two sets of laws, one serving sedentary, agriculturalist and commercial needs, the other supporting nomadic tribal conditions, and heavily dependent on customary laws. This dichotomy clearly was not collateral with social structure, but rather with the type of activity engaged in by a particular group. In criminal matters, for instance, both the Bedouin nomads and the sedentary populations followed, more or less, the same set of customary Bedouin laws. The murder of a man, Bedouin or not, required either commensurate revenge or payment of blood-money, an ancient Near Eastern law that was as much present in the pre-Islamic Peninsula (as documented in the Quran) as in ancient Mesopotamia.[24] In commercial dealings, on the other hand, even the nomads entered into pecuniary and mercantile transactions and contracts that had commonly been practiced in the Near East for centuries, probably as long ago as Babylonian and Assyrian times. In the ancient Thamūdite and Liḥyānite inscriptions (dating several centuries before Islam in north-west Arabia), many texts deal with property rights, both movable and immovable (wells, land), as well as with penal cases and pecuniary transactions.[25] As early as the first century BC, the Yemen had already produced a sophisticated system of law. The Qaṭabānian kingdom was in possession of a trade code, including a Law Merchant, which, among other things, applied to foreign merchants in their dwelling places outside the city gates. Piotrovsky reports that such places accommodated merchants and pilgrims to holy places and have been in existence near ancient, medieval and even modern towns.[26]

The close contacts that the Arabs of the Peninsula maintained between and among themselves, coupled with their extensive relations with their neighbors to the south, north-west and north-east, exposed them to the general legal culture of the Near East. In other words, all the knowledge available to us, whether literary, archaeological or epigraphic, indicates that the Arabs of the Peninsula, Iraq and Syria lived in a well-knit system of kin and material relationships. By all indications, Muḥammad the Prophet and the influential men who surrounded him and who continued their

[23] For a detailed account of economic and material life in pre-Islamic Arabia, see ʿAlī, *Mufaṣṣal*, VII.
[24] Russ VerSteeg, *Early Mesopotamian Law* (Durham, N.C.: Carolina Academic Press, 2000), 107 ff.
[25] ʿAlī, *Mufaṣṣal*, V, 475.
[26] Piotrovsky, "Late Ancient Yemen," 214. See also ʿAlī, *Mufaṣṣal*, V, 476.

bid to establish a Muslim state, were thoroughly familiar with the cultures of Ḥīra and, especially, Syrian Busra, which they visited regularly in their role as prominent merchants. Muḥammad's own sophisticated knowledge of legal practices comes across clearly in the Quran and the so-called Constitution of Medina, two documents whose authenticity cannot be doubted.

2. THE EMERGENCE OF A QURANIC LEGAL IDENTITY

As a product of a mercantile tribal society, Muḥammad was familiar with all the religions and cultures of the Peninsula and of its neighbors, particularly Judaism and Christianity, religions that had many adherents among the major Arab tribes. Medina, to which he was forced to migrate with some followers, had been inhabited by several Jewish tribes. But Muḥammad also knew Yemenite Judaism and was familiar with certain Arab clans that had adopted this religion in western Arabia. Christianity and Christian missionaries, especially of the Nestorian version, likewise had been well established throughout Arabia since the fifth century AD. The Yemen had a large Christian population, but so did eastern Arabia and, as we have seen, southern Iraq and Syria.

Before migrating to Medina, Muḥammad's mission was religious and ethical, calling for humility, generosity and belief in a God who has neither a partner nor a father nor a son, and who is dissociated from the worldly deities worshiped by the Arabian tribes. In Mecca, and probably immediately after arrival in Medina, his message was articulated in terms of continuity with Judaism and Christianity: Islam represented little more than a pure form of these two religions, the Original Faith that, in its Judaic and Christian forms, had been corrupted by later followers of the two religions. Already in Mecca, Muḥammad conceived of himself as a Ḥanīf, probably under the influence of a certain Zayd b. ʿAmr. Fundamentally monotheistic, Ḥanīfiyya appears to have been a specifically Meccan religious development that was formed around the figure of Abraham and the worship of the Kaʿba, which he was believed to have constructed.[27]

Prior to his arrival in Medina, Muḥammad did not, in all probability, have in mind the establishment of a new polity, much less a new law or

[27] Uri Rubin, "*Ḥanīfiyya* and Kaʿba: An Inquiry into the Arabian Pre-Islamic Background of *Dīn Ibrāhīm*," *Jerusalem Studies in Arabic and Islam*, 13 (1990): 85–112.

legal system. Up to that point, and for a short time thereafter, he was largely concerned with faith, morality and the purity of mundane existence. But a new reality forced itself upon him. In Medina, he came face to face with Jews who, like the Meccan tribes, opposed him or at least were dubious about his message. In their view, this message presented a novel form of monotheism, independent and distinct from Judaism and Christianity. Deeply disappointed by their position, Muḥammad began to veer away from certain rituals that the new religion had thus far shared with Judaism: Jerusalem was replaced by the Kaʿba as the sacred shrine of nascent Islam, and emerged as the true site of Abraham the Ḥanīf, who worshiped God directly, and who needed no intercession or intermediate deities. More fundamentally, the Jews presented Muḥammad with an epistemic threat, for their doubts about his message were backed by the fact that they were considered the custodians and interpreters of monotheism and monotheistic scripture. Part of the solution to this threat came at an early stage, when Muḥammad, exploiting a conflict that erupted between the Jewish tribe of Banū Qunayqāʿ and some Medinan Arabs, acted against the former. Having besieged the tribe, he forced them to leave the town with their property, thereby reducing the threat and strengthening his position in Medina.

At the end of the fifth year of the Hijra (early 626 AD), Quranic revelation began to reflect a new development in Muḥammad's career, whereby, apparently for the first time, he started thinking of the new Islamic community, the Umma, as capable of possessing a Law that parallels, but is distinct from, other monotheistic laws. At about this time, Sūra 5 of the Quran was revealed, ushering in a list of commands, admonitions and explicit prohibitions concerning a great variety of issues, from eating swine meat to theft. Throughout, we find references to the Jews and Christians and their respective scriptures. In 5:43 God asks, with seeming astonishment, why the Jews resort to Muḥammad as an arbiter "when they have the Torah which contains the judgment of God." "We have revealed the Torah in which there is guidance and light, [and by which] the prophets who surrendered [to God] judged the Jews, and the Rabbis and Priests judged by such of Allah's Scriptures as they were bidden to observe" (5:43). In the next two verses, the Quran turns to the Christians, saying in effect that God sent Christ to confirm the Prophethood of Moses and the Gospel to reassert the "guidance and advice" revealed in the Torah. "So let the People of the Gospel judge by that which God had revealed therein, for he who judges not by that which God revealed is a sinner" (5:47).

If the Jews and Christians were favored with legally binding revelations, so too are the Muslims, the Quran declares. Sūra 5:48, which marks a turning-point, states:

> We have revealed unto you the Book [i.e., the Quran] with the Truth, confirming whatever Scripture was before it . . . so judge between them by what God had revealed, and do not follow their desires away from the Truth . . . *for We have made for each of you* [i.e., Muslims, Christians and Jews] *a law and a normative way to follow*. If God had willed, He would have made all of you one community. (italics mine)

But God obviously chose not to do so, creating instead three communities with three separate and different sets of law, so that each community could follow *its own* law. The Quran repeatedly stresses that the believers must judge by what was revealed to them,[28] for "who is better than God in judgment" (5:49–50). It is worth noting here that the "normative way" in verse 5:48 is represented by the term "*minhāj*," a cognate of the Hebraic word "*minhāg*" (the Law). The creation of an Islamic legal parallel here speaks for itself.

These verses mark the beginning of substantive legislation in the Quran, i.e., legislation above and beyond matters of ritual, such as prayer and pilgrimage. In other words, the bulk of the substantive legislation seems to have been revealed after the year 5/626, when a distinct body of law exclusive to the Umma, the Muslim community, was first conceived. The traditional count of all the legal verses comes to about five hundred – a number that at first glance seems exiguous, considering the overall size of the Quran. However, as Goitein has perceptively remarked, these verses represent a larger weight than the number may indicate. It is common knowledge that the Quran repeats itself both literally and thematically, but this tendency of repetition is absent in the legal subject matter. The proportion of the legal verses, therefore, is larger than that suggested by an absolute number. And if we consider the fact that the average length of the legal verses is twice or even thrice that of the non-legal verses, it is not difficult to argue, following Goitein, that the Quran contains no less legal material than does the Torah, which is commonly known as "the Law."[29]

This course of Quranic legal development was to be expected. Historically, there can be no doubt that Judaism and Christianity constituted the religious and historical background of Islam. Arab

[28] Quran 2:213; 3:23; 4:58, 105; 5:44–45, 47; 7:87; 10:109; 24:48. Quran 5:44, for instance, states: "He who does not judge by what God has revealed is a disbeliever."

[29] S. D. Goitein, "The Birth-Hour of Muslim Law," *Muslim World*, 50, 1 (1960): 23–29, at 24.

monotheism, including the Ḥanīfiyya, arose on the basis of, and in conjunction with, these two religions. Theologically, Quranic Islam arrived, first, as a corrective and, second, as the final form of Judaism and Christianity, the form they should have taken, but did not. This much is undeniable. These connections account for the Quran's strong tendency to emulate and counter-balance the two other monotheistic religions, especially Judaism. But to argue for historical and theological influences without acknowledging the "*minhāg*ic" influences – which had been incubating among Meccan and Medinan Arabs for generations – would be a serious misreading of history.

It should come as no surprise that Quranic revelation from the last few years of Muḥammad's life shows a conscious tendency toward legislation, a means to assert the independence and uniqueness of the new religion. The legal subject matter grew increasingly larger, while, at the same time, the Umma was slowly differentiating itself from other monotheistic and pagan communities. The Bedouins' gaming, the Arabian markets' practices of risk-cum-gambling ventures, the Christians' and Bedouins' indulgence in wine-drinking, and a multitude of other practices shunned by the new puritan and deeply moral religion, were subjected to limitations or outright prohibition. Legislation was also intended to strengthen the Umma in other ways. The ancient tax of the *zakāt*[30] was rehabilitated in order to provide for the weak and dispossessed, and to assist in the common cause of the new religion. Similarly, a ban on feuding was imposed, and criminal penalties were made commensurate with the injury caused. The fixing of penalties and the establishment of a centrally distributed alms-tax permitted the creation of a true community, an Umma, whose members regarded themselves as individuals independent of tribal affiliation. In other words, these legislations were designed to transpose the individual from the tribal to the Islamic domain, where he or she would have a status in a community of equal members.[31]

The limitations placed on tribal affiliation are also evidenced in the Quranic legislation on inheritance, according to which the family, including the deceased's male agnates, are the sole heirs. And while the male retained much of the powerful status that he had enjoyed in pre-Islamic

[30] The *zakāt* is attested as early as during fourth-century Yemen and South Arabia, where the ancient deities exacted a tithe on commerce, to be expended on public works. See A. F. L. Beeston, "The Religions of Pre-Islamic Yemen," in *L'Arabie du sud*, vol. I (Paris: Editions G.-P. Maisonneuve et Larose, 1984), 259–69, at 264.

[31] Hodgson, *Venture*, I, 181. Hodgson's comments on marriage and inheritance in the Quranic "reform" should be read with caution.

Arabia, Islam granted wives and daughters substantial rights. Meccan practice, nearly identical to Mesopotamian law prevalent since Assyrian times,[32] required the bride's family (normally her father) to give her the dowry that the husband had paid to them. This practice of enhancing the financial security of women was adopted by the Quran, and further augmented by allotting a daughter a share of inheritance equal to one-half of the share of her brother. This allotment appears to have been unprecedented in Arabia. Rights of dowry and inheritance were wedded to another principle that was to become central in later Islamic law, namely, the financial independence of wives: all property acquired by the woman during marriage, or property that she brought into the marriage (including her dowry), remained exclusively hers, and the husband could not claim as much as a hundredth part of it.[33]

Another novel rule was the introduction of the principle of *ʿidda*, a waiting period imposed on divorced women. Whereas before Islam divorce was complete and final upon its declaration by the husband, the Quran now prescribed the postponement of the irrevocable dissolution of the marriage until three menstrual cycles had been completed or, if the woman were pregnant, until the birth of the child. During this period, which allowed for reconciliation between the spouses, the husband was obliged to provide both domicile and financial support for the wife. Furthermore, a divorced woman with a child was to suckle it for a period of two years, and the father was required to provide for mother and child during this same period. If she chose to do so, she could remarry her husband only after she had been married to (and divorced by) another,[34] the intention being, then and now, to force men to think hard before they rushed into divorcing their wives.

Marriage was regulated by restricting spousal eligibility to a limited circle of relations. A man might marry any woman provided that she was not his mother, daughter, sister, aunt, niece, foster-mother, foster-sister, mother-in-law, step-daughter or daughter-in-law. Nor was he permitted to be married to two sisters at the same time. Marriage to women of the Scriptures was permitted, irrespective of whether or not they converted to Islam. A marriage that had not been consummated, furthermore, might be

[32] See M. Stol, "Women in Mesopotamia," *Journal of the Economic and Social History of the Orient*, 38, 2 (1995): 123–44, at 126. For other striking parallels between Peninsular and Mesopotamian laws, see VerSteeg, *Early Mesopotamian Law*, *passim*.

[33] Quran, 4:19 ff.

[34] Ibid., 2:237; 65:1–6; 2:233; 2:230.

legally dissolved without a waiting period. But if the marriage was consummated, the husband owed the wife half of the dowry.[35]

The Quran provided more or less detailed coverage in other areas of family law, as well as in ritual, commercial and pecuniary areas. Yet, although these rules surely did not constitute a system, their fairly wide coverage, and their appearance within a short span of time, pointed clearly toward the elaboration of a basic legal structure. The articulation of a Quranic law exclusive to the Umma escaped neither the Muslims themselves nor their neighbors, who were fully aware of the legal thrust of Muḥammad's mission. Writing in the 660s AD, the near contemporary Armenian Bishop Sebeos duly recognized the fact that Muḥammad upheld a law particular to the new religion, and distinct from other laws.[36]

This new conception of Quranic law does not mean that there occurred a clean break with the legal traditions and customary laws of Arabia. Despite his critical attitude toward the local social and moral environment, Muḥammad was very much part of this environment which was deeply rooted in the traditions of Arabia. Furthermore, as a prominent arbitrating judge (*ḥakam*), he could not have abandoned entirely, or even largely, the legal principles and rules by which he performed this prestigious (but now prohibited) function. Yet, while maintaining continuity with past traditions and laws, Quranic Islam exhibited a tendency to articulate a distinct law for the Umma, a tendency that marked the beginning of a new process whereby all events befalling the nascent Muslim community henceforth were to be adjudicated according to God's law, whose agent was none other than the Prophet. This is clearly attested in both the Quran and the Constitution of Medina.[37]

While new problems encountered by the Prophet and the emerging Umma were to be judged in accordance with the new principles and worldview of Islam, the old institutions and established rules and customs remained largely unchallenged. Indeed, as we shall see later, much of Arabian law continued to occupy a place in Sharīʿa – the later, more mature system of Islamic law. A few examples may serve to illustrate the point. First, a number of ritual practices, such as prayer and fasting, were

[35] Ibid., 4:24 ff.; 2:236; 5:5.

[36] P. Crone and M. Cook, *Hagarism: The Making of the Muslim World* (Cambridge: Cambridge University Press, 1977), 7. For other non-Muslim sources speaking to this effect, see Robert G. Hoyland, *Seeing Islam as Others Saw it: A Survey and Evaluation of Christian, Jewish and Zoroastrian Writings on Early Islam* (Princeton: The Darwin Press, 1997), 414.

[37] On the Constitution of Medina, see R. B. Serjeant, "The Constitution of Medina," *Islamic Quarterly*, 8 (1964): 3–16, at 3.

distinctly pre-Islamic Arabian practices that survived in the legal and religious system of the new faith.[38] Second, the pre-Islamic customary laws of barter and exchange of agricultural products – e.g., bartering unripe dates still on the palm tree against their equal value in picked dried dates (a practice common to oasis-based agriculturalists) – were to persist in Sharīʿa. So were a variety of contracts, mainly pecuniary and commercial. The ancient Near Eastern contracts of sale, dating back to the second millennium BC, and involving immediate delivery with a later payment, or immediate payment for a later delivery, were prevalent in the pre-Islamic Hejaz and wholly incorporated (under *ʿarāyā* and *salam*) into Islamic law.[39] Third, several elements of customary penal laws were retained, such as *qasāma* (compurgation), according to which, if the body of a murdered person is found on lands occupied by a tribe, or in a residential quarter in a city, town or village, fifty of the inhabitants must each take an oath to the effect that they had neither caused the person's death nor had any knowledge of who did. If less than fifty persons were available, those present had to swear more than once until fifty oaths had been obtained. By doing so, they freed themselves of criminal liability, but nonetheless remained bound to pay blood-money to the agnates of the person slain. The adoption of these ancient laws by the mature Sharīʿa was justified by the jurists on the grounds that the Prophet did not repeal them and, in fact, sanctioned them implicitly or in his actual practice.[40]

3. CONCLUSIONS AND METHODOLOGICAL REMARKS

Mounting archaeological, epigraphic and other evidence suggests that the Arabian Peninsula in general, and the Hejaz – the cradle of Islam – in particular, were part and parcel of the general culture that pervaded the entire Near East since the time of Hammurabi. Through intensive contacts with the Lakhmids and the Ghassānids and with their Arab predecessors who had dominated the Fertile Crescent for a century or more before the rise of Islam, the Arabs of the Peninsula maintained forms of culture that were their own, but which represented a regional variation on the cultures of the north. The Bedouin themselves participated in these cultural forms,

[38] See S. D. Goitein, *Studies in Islamic History and Institutions* (Leiden: E. J. Brill, 1966), 73–89, 92–94.

[39] VerSteeg, *Early Mesopotamian Law*, 178; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964), 218.

[40] Muḥammad Ibn Ḥazm, *Muʿjam al-Fiqh*, 2 vols. (Damascus: Maṭbaʿat Jāmiʿat Dimashq, 1966), II, 838–39.

but the sedentary and agricultural settlements of the Hejaz were even more dynamic participants in the commercial and religious activities of the Near East. Through trade, missionary activities and connections with northern tribes (and hence constant shifting of demographic boundaries), the inhabitants of the Hejaz knew Syria and Mesopotamia quite as well as the inhabitants of the latter knew the Hejaz. When the new Muslim state began its expansion to the north, north-west and north-east, it did not enter these territories empty-handed, desperately in search of new cultural forms or an identity. Rather, the conquering Arabs, headed by a sophisticated leadership hailing from commercial and sedentary Medina and Mecca, were very much products of the same culture that dominated what was to become their subject territories.

All this must have a profound effect on how modern scholars conceive of the formation of Islamic law, and what elements went into its making. To view the new Muslims as desert dwellers who, before embarking on their conquests, lived an impoverished life of nomadism and tribalism can only lead to a theory in which all Muslim cultural forms, including legal institutions, were borrowings from the high imperial cultures of the north, especially that of Byzantium. Such a view would comport with the now widespread perception of Muslims as backward, always in need of assimilating "western" culture and values so as to keep pace with modernity and progress.[41] The preceding discussion has shown, however, that such a view of the sixth- and seventh-century Near East, including Arabia, is untenable. The Arabian Peninsula was as much a part of the Near East as were, among others, Palestine, Syria and Egypt.

But we would run an even greater risk if we were to characterize the culture of the Near East as Hellenic, attributing to it features that ultimately were imported from Greece and Rome. For one could still agree that the pre-Islamic Peninsular Arabs participated in the general culture of the Near East, yet still insist that that culture, in any of its varieties, was essentially Greek and Roman, the very same traditions that formed the cultural foundations of Byzantium. The risk stems from the erroneous assumption that because Byzantium, and before it Rome and Greece, adopted these cultural forms, they must then be originally Roman and/or Greek. Take, for example, the case of Beirut's law school, thought to be an eminently Roman institution. In a recent study, Warwick Ball aptly avers:

[41] For an analysis of this theme within the context of writing the origins of Islamic law, see Hallaq, "Quest for Origins"; see also the introduction in Hallaq, ed., *The Formation of Islamic Law*.

At the beginning of the third century the [Phoenician, but Roman] Emperor Septimius Severus founded Beirut's most famous institution. This was the Law School, the first such institution in the Roman world, and it was enthusiastically supported by the [originally Near Eastern] Severan emperors. The Beirut Law School was to have a profound effect on Roman civilization. It represents the birth of Roman – hence European – jurisprudence, of which Justinian's monumental *Digest* was the first great achievement. It attracted many prominent legal minds, mostly drawn from the Phoenician population of the Levant itself. The most famous was Papinian, a native of Emesa, and his contemporary Ulpian, a native of Tyre. Both were patronised by the Severan dynasty . . . and both were acknowledged in Justinian's *Digest* as forming the basis of Roman Law . . . Beirut and its justly famous law school, and with it its profound legacy, is regarded as a "western" and Roman enclave in the Near East. But it was founded and promoted by emperors whose origins and destinies were intimately bound to Phoenician culture. Above all, it must be emphasised that . . . the environment of Beirut and its law school is the Near East, not Italy. Many of the great scholars who dominated it were natives of the Near East, however Romanised, notably Papinian and Ulpian. It drew upon literary traditions that stretched back to Sanchuniathon of Beirut in the seventh century BC and legal traditions that stretched back even further to the Judaic traditions of the early first millennium and the Mesopotamian law codes of the early second millennium. Ultimately, therefore, should we be viewing Beirut in the context of Rome or of Babylon?[42]

The example of Beirut's law school is merely a small part of the much larger story of Rome's dependence on the Semitic Orient. It is increasingly becoming clear to modern scholarship that the Near East not only had a long history of urbanism and urban structures that pre-dated both the Greeks and the Romans, but also that what came to be known as the Roman heritage of the Near East was in many respects a heritage heavily indebted to the indigenous Semitic cultures of the ancient Near East, not, in fact, to Greece or Rome.[43]

Thus, whatever cultural and legal institutions existed in the Byzantine–Roman Near East cannot be taken, prima facie, to have emanated from Rome and Byzantium. Methodologically, therefore, any claim of cultural transmission must pass the test of "genealogy," namely, that

[42] Warwick Ball, *Rome in the East: The Transformation of an Empire* (London and New York: Routledge, 2000), 173–74.

[43] See ibid., *passim*, as well as Maurice Sartre's *L'Orient romain* (Paris: Seuil, 1991), which in some respects anticipates Ball's work. Also see Wael Hallaq, "Use and Abuse of Evidence: The Question of Roman and Provincial Influences on Early Islamic Law," *Journal of the American Oriental Society*, 110 (1989): 79–91, reproduced in W. Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Aldershot: Variorum, 1994), article IX, 1–36, at 30–31, and sources cited therein (n. 17).

whenever a claim is made to the effect that one civilization had absorbed a cultural form from another, it is indispensable for the validity of the claim to show that that form originated in the latter civilization and that it is not a regurgitated or rehabilitated form, ultimately taken either from a third civilization or from an earlier incarnation of the very culture that is said to have engaged in borrowing.

Even if we assume that the Peninsular Arabs came to the Fertile Crescent devoid of any "high culture," as some modern scholars assert, whatever these new Muslims happened to incorporate into their new empire and legal system was fundamentally Near Eastern and Semitic, however thin or thick were the Byzantine and Roman veneers. But we need not go this far: this chapter has showed that these Arabs were, demographically, religiously and commercially (and, we may add, politically and militarily) an integral part of the larger Near East and its culture. They hardly could have found the Fertile Crescent to be as new or different as, more recently, the French found Algeria or the British India. The Fertile Crescent was no more than a cultural neighbor whose home and conduct – nay, problems – they knew and understood; and when they took over that dwelling-place, they moved with much of their belongings, and managed to live in it comfortably and even renovate and expand it dramatically.

CHAPTER 2

The emergence of an Islamic legal ethic

1. THE ARAB CONQUESTS

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

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

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