THEMES IN ISLAMIC LAW

The Origins and Evolution of Islamic Law

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CHAPTER 3

The early judges, legal specialists and the search for religious authority

1. THE EARLY JUDGES

In the previous chapter, we saw that the proto-*qāḍī*'s office was not limited to resolving legal disputes and that it involved other activities related to tribal arbitration, financial administration, story-telling and policing. These were normative functions in *qāḍī*s' appointments down to the 80s/700s and even 90s/710s.[1] Whatever change this office subsequently underwent was by no means sudden. From the ninth decade of the Hijra, the *qāḍī*'s office increasingly was limited to conflict resolution and legal administration. From this point on, some *qāḍī*s were appointed *qua qāḍī*s, with no explicit stipulation of other duties that they should undertake. In fact, the distinctness of these duties and functions was made obvious by the nature of appointments. Thus, when ʿAbd al-Raḥmān al-Jayshānī was dismissed from his function as judge of Egypt sometime during the 130s/750s, he was immediately reappointed there as a tax-collector.[2] The expansion and growing complexity of state functions appear to have required a narrowing down of the duties assigned to officials. However, these appointments seem to have been relatively few in number and for a few decades thereafter many judges continued to combine this office with other functions.[3]

The centralization of Umayyad legal administration appears to have begun during the last years of the first century H, a policy that marked a change in the nature of judicial appointments. Sulaymān b. ʿAbd al-Malik (r. 96/714–99/717) seems to have been the first caliph to appoint judges directly from Damascus, thereby initiating the policy of removing from local governors the authority to make such appointments.[4] ʿIyāḍ b. ʿUbayd

[1] Kindī, *Akhbār*, 322, 324, 325, 327, 332, 348 and *passim*.
[2] Wakīʿ, *Akhbār*, III, 232.
[3] Kindī, *Akhbār*, 322, 324 and *passim*.
[4] Bligh-Abramsky, "Judiciary," 57–58, assigns the first caliphal appointment to the time of al-Manṣūr (r. 136/754–58/75). See next note.

Allāh al-Azdī appears to have been the first to receive such an appointment in 98/716, and a year or so later his post was renewed by Sulaymān's successor, the caliph 'Umar II.[5] Thereafter, and until the fall of the Umayyad dynasty, most judges were appointed directly by the caliphs.[6] This change in policy partly reflected the coming to maturity of centralization policies and partly a change in the scope of the judges' functions, especially the gradual removal from their purview of non-judicial, administrative tasks. It also reflected the growing awareness of a separate province of law distinct from other administrative functions – a province that was gradually acquiring an independent status. Although the appointments that marked an independent judiciary did not become the norm until the middle of the second/eighth century, the beginnings of this process must be located during the 90s/710s.

By this time, law had begun to acquire its own independent character – separate from tribal arbitration[7] and financial and police administration – and its application was to spread to other towns as well as to non-Muslims. After the third quarter of the first century H, judges began to be appointed to such towns as Alexandria in Egypt and Ḥimṣ in Syria, and to large cities in the former Sasanid world, primarily Khurāsān. This legal expansion mirrored a collateral demographic movement that saw the Arabs relocate from the chief garrison towns to the smaller cities and towns previously inhabited exclusively by non-Muslims (and frequently by non-Arabs). The penetration of this Muslim population into the conquered cities brought the new masters into direct contact with Christians (who were mostly Arabs), Jews and people of other faiths. Inevitably, legal disputes arose in the midst of these mixed communities, and many of these (including all those involving Muslims) were brought before Muslim judges. It is reported of the Egyptian judge Khayr b. Nu'aym, for instance, that once he finished presiding over cases brought to him by Muslims, he would move his court session out to the gate of the mosque in order to adjudicate disputes between Christians (whom we may assume to have been Copts).[8]

[5] Kindī, *Akhbār*, 333, 335–36. Bligh-Abramsky (see citation in previous note) apparently overlooked this account of Kindī, and instead adopted his later account (p. 368) which makes 'Abd Allāh b. Lahī'a the first judge to be appointed by a caliph, in 155/771.

[6] Kindī, *Akhbār*, 340.

[7] During his tenure between 115/733 and 120/737, the Egyptian judge Tawba b. Nimr apparently refused to interfere in tribal disputes. It is reported that he sent all such disputes back to the chiefs of the tribes for arbitration: Kindī, *Akhbār*, 345–46. This certainly was part of the proto-*qāḍī*'s jurisdiction, as it represented a continuity of the practices of *ḥakam*, the pre-Islamic arbiter.

[8] Kindī, *Akhbār*, 351. Khayr b. Nu'aym held the judgeship between 120/737 and 127/744.

The gradual specialization of the function of *qaḍā'* and the growing complexity of this function led to developments within the *qāḍī*'s court (*majlis*). At this juncture, it is important to note in passing that the *majlis al-qaḍā'* – the equivalent of a law court in the West – revolved around the figure of the judge, so that the court structure was an extension of his functions and judicial personality. In the West (both continental and common law systems), the court, comparatively speaking, has tended to be less dependent on the judge. Physically, the courtroom or courthouse in the West is a structure specifically designated for holding the public sessions of a court, with its various offices. The court, in other words, is the combined phenomenon of magistrate and building occupied and appropriated according to the law for the holding of trials.[9] The Muslim *qāḍī*, by contrast, had no specific place in which to conduct his sessions, a situation that was to persist in Islam for nearly a millennium.[10] Hence, the *majlis al-qaḍā'*[11] was frequently held in the mosque, but also at the *qādī*'s private residence, in the marketplace and even in public streets.[12]

One of the earliest developments in the *qāḍī*'s court was the keeping of minutes and the registration of legal transactions. The rudimentary beginnings of this practice appear to have been around the 50s/670s, reportedly because the judges' rulings were either forgotten or misconstrued by the parties to litigation. But it is also likely that such practices were already normative in the courts of the communities conquered by Muslims, and that these practices were quickly adopted by the first Muslim judges. For instance, sometime before 60/679, Sulaym b. 'Itr is said to have been the first judge (at least in Egypt) to keep a record of his rulings, or a part thereof. He is supposed to have begun the practice after resolving a dispute among heirs to an estate over the wording of his ruling in their case. When the parties to the dispute reappeared in his *majlis* seeking to establish the precise nature of the decision he had rendered earlier, he wrote down a summary of the ruling and had the military commander attest to it.[13] It is unlikely, however, that Sulaym or any other contemporary judge made the recording of court minutes a regular or systematic practice. Nor were the records themselves particularly detailed or complete. Sometime after

[9] *Black's Law Dictionary*, 5th ed. (St Paul: West Publishing Co. 1979), 320.
[10] Wael Hallaq, "The *Qāḍī*'s *Dīwān* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies*, 61, 3 (1998): 415–36, at 418.
[11] Literally, *majlis* means a place where one sits. *Majlis al-qaḍā'* means the place where the activity of *qaḍā'*, whose agent is the judge, transpires. By extension, it is the place where the judge sits.
[12] Wakī', *Akhbār*, I, 339, 341; II, 316.
[13] Kindī, *Akhbār*, 309–10.

86/705, ʿAbd al-Raḥmān b. Khadīj began the practice of recording orphans' pensions in "a book he had,"[14] which suggests that such matters were not registered prior to that time. Expectedly, Ibn Khadīj's practice does not seem to have been thorough enough, for we know that Khayr b. Nuʿaym improved on it some five decades later.[15] To be sure, the judge's register, properly known as a *dīwān*, continued to develop until the end of the second/eighth century, when it seems to have taken a final shape. But the intermittent beginnings of this process can be traced to the third quarter of the first century (ca. 670–95 AD), and acquired a sort of normative status during the fourth, when *qāḍā*' began to be defined as a specifically legal institution.

The second significant development was the evolution of a court staff, the members of which aided the judge in one way or another. By the end of the first century, it appears that the court sheriff (*jilwāz*), whose function was to keep order in the courtroom, had already become an established functionary.[16] It is highly likely that this function originated concomitantly with the proto-*qāḍī*s, who were often appointed as chiefs of police and thus possessed the power to retain policing personnel to serve them in maintaining order. And if this is the case, we can assume that the *jilwāz*'s function dates back to the middle of the first century (ca. 670 AD), if not earlier.

Likewise, toward the end of the first century – and probably shortly before – the function of the court scribe emerged, as was to be expected; the need to keep written records of court business and legal transactions made such a post imperative. And although, as we have seen, some early judges had themselves begun taking notes of decisions, it was not a task that they retained, especially as the business of the court grew in complexity. Most judges therefore had one scribe (*kātib*), but some had more, depending on how busy the court was. Our sources report that the Egyptian judge Yaḥyā b. Maymūn had three scribes and possibly more.[17]

The court scribes also issued documents on behalf of the judge to litigants, usually attesting to a right or a transaction (e.g. a verdict in favor of X, or the purchase of a house by Y). It appears that the scribes themselves used their position as a springboard to higher jobs (and continued to do so for centuries to come), especially *qāḍā*'; Thus, the

[14] Ibid., 325.
[15] Ibid., 355.
[16] Wakiʿ, *Akhbār*, II, 417.
[17] Kindī, *Akhbār*, 340.

young Saʿīd b. Jubayr, a scribe serving the Kūfan *qāḍī* ʿAbd Allāh b. ʿUtba around 95/713, later became a judge himself.[18] Being a scribe appears to have been, from the very beginning, part of the apprenticeship required for *qāḍā*ʾ.

The practice of witnesses giving testimony, among other things, to adjudication procedure and documentary evidence was an ancient institution,[19] and it was natural that witnesses became a feature of the court. Each judge appointed a number of these for such purposes, delegating to them as well the task of signing court minutes at the end of each litigation. Known as court witnesses (later called *shuhūd ḥāl*), they were distinct from witnesses procured by the plaintiff or defendant to attest in favor of a fact or a claim. These latter, generally known as *shuhūd ʿayān*, had been used in conflict resolution since Prophetic times. Nonetheless, even as late as the third decade of the second century (ca. 740 AD), the procedural law concerning this type of witness had not yet been fully developed. For example, in court cases of a similar nature tried at about this time, most judges appear to have accepted a claim on the basis of a single witness, while only some insisted upon two. Yet it was the latter that became the normative procedure in later Islamic law.[20]

If witnesses and scribes became part of the courtroom apparatus, then it is not surprising that written communication between judges (known in later times as *kitāb al-qāḍī ilā al-qāḍī*) became, by 100/718, a fairly established practice.[21] This communication – duly attested to, and conveyed, by court witnesses – took place when a judge in a particular locale wrote to a judge in another jurisdiction concerning a person's right that he, the first judge, was able to establish against another person. The idea was that the receiving judge would apply the effects of the communication in his jurisdiction. Although we cannot confirm the exact procedures followed in the early phases of this practice, it is unlikely that they conformed to the strict requirements of attestation that later became the norm. Legal institutions of this sort were still evolving, as evidenced by the fact that the rules of procedure in this area were not yet settled. However, by the 140s/760s, it appears that some judges began to insist that all written instruments between and among *qāḍī*s be attested by witnesses. The Kūfan judge Ibn

[18] Shams al-Dīn Aḥmad Ibn Khallikān, *Wafayāt al-Aʿyān*, 4 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1417/1997), I, 367.

[19] Attested in Quran 2:282.

[20] Kindī, *Akhbār*, 346; Wakīʿ, *Akhbār*, I, 145–46, 287.

[21] Wakīʿ, *Akhbār*, II, 11, 12; see also Wael B. Hallaq, "*Qāḍī*s Communicating: Legal Change and the Law of Documentary Evidence," *al-Qanṭara*, 20, 2 (1999), 437–66.

Abī Laylā is said to have been one of the earliest judges to follow such procedures, a practice that the Baṣran judge Sawwār b. ʿAbd Allāh adopted soon thereafter.[22]

The increasing specialization of the judge's office manifested itself in the growing dependence of the *qāḍī* upon legal specialists who made it their concern to study the law and all emerging disciplines with which it was associated. The first signs of the tenet that the judge should consult legal experts (a tenet that was to become the basis of practice throughout much of Islamic legal history) seems to have emerged during the last decade of the first century (ca. 715 AD).[23] This assertion is based upon two considerations. First, by this time (as we shall see momentarily), a class of legal experts was already on the rise. Second, there existed even then a distinction, albeit vague, between the judges and the legal specialists who would later be called *muftī*s (jurisconsults). The legal specialists were, by definition, knowledgeable in the law as a substantive and technical discipline, which was not necessarily the case with the judges. For while some judges were known for their expertise in the law – since they themselves came from the circles of legal specialists – many others were not. For example, the Egyptian judge Ghawth b. Sulaymān is said to have been a shrewd and seasoned *qāḍī* (i.e., he understood people and was highly skilled as a conflict mediator) but to have lacked a mastery of law as a technical discipline.[24] It was thus natural and far from uncommon for a provincial governor or a caliph to enquire, prior to making a judicial appointment, whether a candidate was a legal specialist or not.[25] In a nutshell, the judge's knowledge of the law as a technical legal discipline was not yet taken for granted.

Indeed, by the end of the first century it was no longer possible to employ illiterate judges, for the growing complexity of social and economic life made it necessary to appoint men who could resolve intricate disputes successfully and who could apply the law as elaborated by the legal specialists. Furthermore, with the gradual rise of the class of legally minded scholars, a more educated group of men was available to fill a variety of state functions, including *qaḍā'*. But this did not mean that they always had to be legal experts. (Even in much later times, when law became a professional discipline, *qāḍī*s *qua qāḍī*s were, as a rule, never associated with the

[22] Wakīʿ, *Akhbār*, II, 67.
[23] Ibid., II, 415, 423.
[24] Kindī, *Akhbār*, 357–58.
[25] See, e.g., ibid., 364.

best legal minds or even first-rate expertise in law and jurisprudence.)[26] We have seen that they were, and long continued to be, state functionaries whose involvement with the law remained provisional, occupied as they were with other non-legal functions.

2. THE LEGAL SPECIALISTS EMERGE

The locus of legal expertise, therefore, was not the *qāḍī*s, but rather a group of private individuals whose motivation to engage in the study of law was largely a matter of piety. While it is true that a number of these did serve as *qāḍī*s, their study of the law was not necessarily associated with this office or with benefits or patronage accruing therefrom. Nor was it – in this early period – associated with a search for career opportunities in government, accumulation of wealth, or any form of worldly power. Rather, they were driven above all by a profoundly religious commitment which demanded of them, among other things, the articulation of a law that would deal with all the problems of society.

The rudiments of legal scholarship appear to have developed within the generation that flourished between 80 and 120 H (roughly between 700 and 740 AD). This is not to say of course that Islamic law as a nascent religious system began to surface only at that point. We have seen that the Quran – as a spiritual and legal guide – was of central importance from the very beginning and that caliphal law also acquired a religious sanctity by virtue of the fact that the caliphs were God's and Muḥammad's deputies on Earth. Added to this was the steady infusion into *sunan* of a pronounced religious element. Yet, what was different about this period was the emergence of a new activity, namely, personal study of religious narratives and the evolution of specialized circles of learning, properly known as the *ḥalaqa* (lit. circle; pl. *ḥalaqāt*).

Private study was not dissociated from the activity that took place in the *ḥalaqa*, for one appears to have complemented the other. Private study prepared one for the often intense debates that went on in the *ḥalaqa*, and this latter activity must have challenged the minds of the learned and encouraged their individual pursuit of knowledge. The *ḥalaqa* was usually held in the mosque, which had served as a place of public discussion and instruction since the first two or three decades of Islam. It may well have developed out of the activity of story-tellers, especially those who focused

[26] Hallaq, *Authority*, 167–74.

their attention on Quranic exegesis, Prophetic *sīra* and proper conduct or religious service. Some *ḥalaqa*s were exclusively concerned with Quranic interpretation, while others were occupied with Prophetic narrative (emerging later as Prophetic Sunna). But some *ḥalaqa*s were of an exclusively legal nature. During the opening decade of the second century H, Abū ʿAbd Allāh Muslim b. Yasār, one of the most distinguished legal specialists of Baṣra, regularly held a legal *ḥalaqa* in that city's grand mosque.[27] In Kūfa, ʿĀmir al-Shaʿbī (d. 110/728), also a distinguished legist, is reported to have had an enormous *ḥalaqa*.[28] So did Ḥammād b. Abī Sulaymān (d. 120/737), another distinguished Kūfan authority.[29] We are told that as many as forty students and learned men regularly attended the circle of the Medinese legist Rabīʿa b. Abī ʿAbd al-Raḥmān (otherwise known as Rabīʿat al-Raʾy; d. 136/753).[30] In Medina too ʿAṭāʾ b. Abī Rabāḥ, Nāfiʿ (d. 118/736) and ʿAmr b. Dīnār had their own circles of study in which there participated a number of legists who came to prominence during the next generation.[31] Equally important were small mosque gatherings of scholars who would exchange religious ideas related to the Quran and matters legal. We know, for example, of the famous discussions that took place among Qatāda b. Diʿāma al-Sadūsī (d. 117/735), Saʿīd b. al-Musayyab (d. 94/712 or 105/723) and al-Ḥasan al-Baṣrī (d. 110/728).[32] Sometime around 120/737, another small group of prominent specialists is reported to have held legal discussions that frequently lasted until the early hours of the morning.[33] Similarly, the leading legal specialists of Medina – including Saʿīd b. al-Musayyab, al-Qāsim b. Muḥammad, Khārija, Sulaymān b. Yasār and ʿUrwa – are said to have met regularly to discuss the legal issues of the day, issues that also faced the Medinese judges in their courts.[34]

During the period in question, the eminent legal specialists conducted their activities in the major centers of the new empire, namely, Medina, Mecca, Kūfa, Baṣra, Damascus, Fusṭāṭ, Yemen and, marginally, Khurāsān. A statistical survey of an important early biographical work dedicated to jurists reveals that these centers of legal scholarship generated eighty-four

[27] Shīrāzī, *Ṭabaqāt*, 88.
[28] Wakīʿ, *Akhbār*, II, 421.
[29] I. Goldziher, *The Ẓāhirīs: Their Doctrine and their History*, trans. Wolfgang Behn (Leiden: E. J. Brill, 1971), 13, on the authority of Dhahabī's *Ṭabaqāt al-Ḥuffāẓ*.
[30] Shīrāzī, *Ṭabaqāt*, 65; Ibn Khallikān, *Wafayāt*, I, 330.
[31] Harald Motzki, "Der Fiqh des–Zuhrī: die Quellenproblematik," *Der Islam*, 68, 1 (1991): 1–44, at 14, and sources cited therein.
[32] Ibn Ḥibbān, *Thiqāt*, 222.
[33] Wakīʿ, *Akhbār*, III, 79.
[34] Dutton, *Origins*, 13.

towering figures who are considered the elite of the legally minded in the Islamic tradition. Their distribution between the above centers was as follows: twenty-two from Medina (26.2 percent); twenty from Kūfa (23.8 percent); seventeen from Baṣra (20.2 percent); nine from Syria (10.7 percent); seven from Mecca (8.3 percent); five from Yemen (6 percent); three from Egypt (3.5 percent); and one from Khurāsān (1.2 percent).[35] The Hejaz and Iraq, therefore, could claim the lion's share of this pool of talent, generating close to 70 percent of the entire body of legal scholarship, and close to 80 percent, if we include the Yemen. Syria generally occupied a secondary position, while Fusṭāṭ and Khurāsān were of marginal importance. It would not be inaccurate, therefore, to assert that the early rise of legal scholarship took place where the Arabs, together with their Arabicized clients, constituted a significant proportion of the population.[36]

Among Medina's chief legal specialists were Qāsim b. Muḥammad, Sulaymān b. Yasār (both d. ca. 110/728), Saʿīd b. al-Musayyab, ʿAbd al-Malik b. Marwān, Qabīṣa b. Dhuʾayb, ʿUrwa b. al-Zubayr (d. 94/712), Abū Bakr b. ʿAbd al-Raḥmān (d. 94/712), ʿAbd Allāh b. ʿUtba (98/716), Khārija b. Zayd (d. 99/717) and Rabīʿat al-Raʾy.[37] In Mecca, they were ʿAṭāʾ b. Abī Rabāḥ (d. 105/723), Mujāhid b. Jabr (d. between 100/718 and 104/722), ʿAmr b. Dīnār (d. 126/743) and ʿIkrima (d. 115/733).[38] In Kūfa, they were Saʿīd b. Jubayr (d. 95/713), ʿĀmir al-Shaʿbī, Ibrāhīm al-Nakhaʿī (d. 96/714) and Ḥammād b. Abī Sulaymān (d. 120/737).[39] In Baṣra, they were Muḥammad b. Sīrīn (d. 110/728), Abū ʿAbd Allāh Muslim b. Yasār, Qatāda b. Diʿāma and Abū Ayyūb al-Sakhtiyānī (d. 131/748).[40] In Syria and Yemen, they were Makḥūl (d. 113/731 or 118/736) and Ṭāwūs (d. 106/724), respectively.[41]

These men are acknowledged in the sources as having excelled in law, but not yet in jurisprudence as a theoretical study – a discipline that was to develop much later. Some of them possessed a special mastery of Quranic law, especially inheritance, while others were known for their outstanding competence in ritual law. ʿAṭāʾ b. Abī Rabāḥ, of Mecca, for instance, seems to have had remarkable expertise in the latter, and was able to issue

[35] Shīrāzī, *Ṭabaqāt*, 54–94.
[36] For more on this, see H. Motzki, "The Role of Non-Arab Converts in the Development of Early Islamic Law," *Islamic Law and Society*, 6, 3 (1999): 293–317.
[37] Ibn Ḥibbān, *Thiqāt*, 59, 65, 80, 90, 146; Shīrāzī, *Ṭabaqāt*, 58, 59, 60, 62, 65.
[38] Shīrāzī, *Ṭabaqāt*, 69–71; Ibn Ḥibbān, *Thiqāt*, 189–90.
[39] Shīrāzī, *Ṭabaqāt*, 81–84.
[40] Ibid., 88–89.
[41] Ibid., 73, 75; Dimashqī, *Tārīkh*, I, 245.

trustworthy opinions (*fatwā*s) on such matters.[42] The Medinan Khārija b. Zayd, on the other hand, achieved a reputation for his expertise in the law of inheritance, as well as for his notarial skills. He is described as having developed proficient knowledge in "writing documents for people," and his legal opinions are reported to have been most reliable.[43] Others, first and foremost Shaʿbī of Kūfa, developed what seems to have been exceptional knowledge of legal precedent. Shaʿbī is reported to have gained unmatched knowledge of *sunan māḍiya*, the model and authoritative conduct of leading men of the past.[44] These *sunan*, as we have seen, constituted one of the chief sources of the law, and continued to do so for more than a century after Shaʿbī's death.

By virtue of their pedagogical activities, these men of learning initiated what was to become a fundamental feature of Islamic law, namely, that legal knowledge as an *epistemic* quality was to be the final arbiter in law making. The learned were thought to know best what the law was, for soon this emerging doctrine had its own justification. Working with the law, even with quasi-legal matters, began to emerge for the first time as a textual activity, not merely as a matter of practice. This textual activity belonged to the generation described above, whose scholarly endeavor was concentrated in the last two decades of the first century and the first two of the second (700–35 AD). It is this gradual textualization of law, legal knowledge and legal practice that should be seen as the first major development in the production of permanent forms that were to survive into, and contribute to, the further formation of later Islamic law.

As noted, the activity of collecting the Quran had a primary legal significance, for it defined the subject matter of the text and thus gave the legal specialists a *textus receptus* upon which to draw. Of immediate concern to these men were certain passages that bore on the same issues but that seemed mutually contradictory. Their attempts to harmonize such Quranic texts marked the rudimentary beginnings of the theory of abrogation (*naskh*), a theory that later stood at the center of legal hermeneutics. The primary concern was with neither theology nor dogma, but rather with

[42] Ibn Ḥibbān, *Thiqāt*, 189–90; Shīrāzī, *Ṭabaqāt*, 69.

[43] Shīrāzī, *Ṭabaqāt*, 60. On others writing documents at this time, see Ibn Ḥibbān, *Thiqāt*, 122, 199, 241; Ibn Ḥibbān, *Mashāhīr*, 113, 124, 133, 135, 136, 141, and *passim*. Also Hoyland, *Seeing Islam*, 687–703. In a terse but revealing statement, Dimashqī, *Tārīkh*, I, 243, reports, on the authority of Yazīd b. ʿAbd Rabbih, that the latter had read in an army stipend ledger (*dīwān al-ʿaṭā'*) that a certain Ibn Miʿdān and someone known as Ibn ʿAdī both died in 104/722. This statement attests to the survival of *dīwān*s for more than a century after they had come into existence.

[44] Shīrāzī, *Ṭabaqāt*, 81; Ibn Khallikān, *Wafayāt*, II, 6–8.

the actions through which Muslims could realize obedience to their God, in adherence to the Quranic command. Thus it was felt necessary to determine the Quranic stand on particular issues. When more than one Quranic decree was pertinent to a single matter, such a determination was no easy task. To solve such difficulties, it was essential to determine the chronological order in which different verses had been revealed. Generally speaking, the provisions of later verses were thought to supersede those of earlier, contradictory ones.

Although the Prophet's Companions and their younger contemporaries were reportedly involved in initiating such discussions, Muslim sources make relatively few references to their contributions to this textual activity. It was the generation that flourished roughly between 80 and 120 (ca. 700–35 AD) that was most closely associated with discussions on abrogation and with controversies about the status of particular verses. Nakha'ī, Muslim b. Yasār (d. 101/719), Mujāhid b. Jabr (d. between 100/718 and 104/722) and al-Ḥasan al-Baṣrī (d. 110/728) were among the most prominent in this debate.[45] Qatāda b. Di'āma al-Sadūsī and Shihāb al-Zuhrī (d. 124/742) are also associated with writings that attest to the beginning of a theory of abrogation, a theory that by then had already been articulated in a rudimentary literary form.[46] It is likely that this theory developed in a context where the provisions of some verses contradicted the actual practice of the community, thus giving rise to the need for interpreting away, or canceling out, the legal effect of those verses deemed inconsistent with other verses more in line with prevailing customs. However the case may be, the very nature of this theory suggests that whatever contradiction or problem needed to be resolved, this was to be done within the purview of Quranic authority. It was generally accepted as an overriding principle that nothing can repeal the word of God except another word from the same source.

The authority of the Quran extended itself to nearly all areas of Muslim life, including the administrative regulations of the caliphs. Whenever the Divine Text was held to express a rule or a law on any particular matter, the caliphs generally followed that rule without qualifications and enacted further regulations in compliance with the spirit, if not always the letter,

[45] David S. Powers, "The Exegetical Genre *Nāsikh al-Qur'ān wa-Mansūkhuh*," in Andrew Rippin, ed., *Approaches to the History of the Interpretation of the Qur'ān* (Oxford: Clarendon Press, 1988), 117–38, at 119.

[46] Andrew Rippin, "al-Zuhrī, *Naskh al-Qur'ān* and the Early *Tafsīr* Texts," *Bulletin of the School of Oriental and African Studies*, 47 (1984): 22–43, at 22 ff.; Ibn Ḥibbān, *Thiqāt*, 222.

of the Quran. We have seen that the caliphs not only promulgated laws and regulations enforceable in both the capital and the provinces, but also presented themselves as a (mediating) source of law for the proto-*qāḍī*s as well as for the judges of the turn of the century. Seeking the caliph's opinion on difficult cases was and continued to be a frequent practice of judges at least to the middle of the Umayyad period (with a marked decrease thereafter). This practice, however, was in no way insulated from the rising tide of legal thinking and the articulation of juristic doctrine that was developing within the circles of legal specialists whom, in turn, the caliphs themselves consulted. Caliphal law, like Companions' and Successors' law, was subjected to their scrutiny, for it now had to conform to the evolving systematization of legal doctrine and thought. Seen as deriving from the authority of the Companions (including the first four caliphs[47]) and that of the Successors (living during the reigns of the middle and late Umayyad caliphs), this law was integrated – but also modified – by the specialists. We may therefore assert that the juristic activities of this first generation of legal specialists marks a process whereby caliphal legislation and caliphal legal authority began, as part of the *sunan*, to lose ground in favor of the evolving culture of the *fuqahā'*, the individual Muslim jurists. It should not come as a surprise then that one of the most distinguished later works cites Yazīd b. ʿAbd al-Malik (r. 101/718–105/723) as the last caliph whose practices and decrees constituted authority-statements.[48] From that point onward, caliphal law ceased to constitute *sunna*, although caliphal legal involvement (aided by the jurists themselves) did continue for about a century or more thereafter.[49]

Generally speaking, wherever the Quran was silent or bore only indirectly on certain matters, it was left to precedent, the *sunan* and considered opinion (*ra'y*) to adjudicate. Thus, even in the absence of its articulation by Muslim men of learning, we may infer that the hierarchy of legal sources was as follows: the Quran, *sunan* – including caliphal law and the Prophet's model – and *ra'y*. It has to be kept in mind, however, that these sources were not mutually exclusive; rather, they encroached on each other heavily. Caliphal law, for instance, was often a derivative of *sunan*, whether caliphal, Prophetic or otherwise; at times it was Quranic in letter or in spirit; at others, it was pure *ra'y*, namely, the opinion of a particular caliph or of his predecessors, or of another Companion or jurist.

[47] With the exception of Abū Bakr. See n. 61 below.
[48] This work is Mālik's *Muwaṭṭa'*, written in Medina around 150/767. See Dutton, *Origins*, 121.
[49] See chapter 8 below.

3. THE RISE OF PROPHETIC *ḤADĪTH*

By around 120/737, it was clear that Prophetic authority was on the rise, and growing at a steady pace as a distinct type of *sunan*. Muḥammad's authority, perceived to be expressed *inter alia* in his *sīra*, had no doubt been a part of these sanctified *sunan*. But what enhanced the value of the Prophetic biography as a superior model was the Quranic insistence on this model as a unique, nearly divine, example. Yet, the delay in perceiving the Prophetic model in these terms can be attributed in part to the gradual assimilation of Quranic and other religious values in the new Muslim society. The Quran's meanings were obviously not fixed, but grew with the religious growth of the Muslim community. Indeed, the gradual rooting of the Quranic imperative in the Muslim psyche may be illustrated by the example of the proto-*qāḍī*s' attitudes towards the consumption of wine.[50] The slow enforcement of its prohibition typically reflected the gradual but steady infiltration of religio-ethical values into the minds and hearts of Muslims. Another illustrative example is the rise of ascetic piety, which had been nearly absent among the Peninsular Arabs and which had become a permanent social ethic during the second/eighth century and thereafter. There is little doubt, furthermore, that the textualization of Islam toward the end of the first/seventh century significantly contributed to a widespread and thorough assimilation of Quranic values, for it was during this period that the Quran was subjected to an unprecedented hermeneutic in which close attention was paid to its legal minutiae. With the full legal implications of the Quran articulated, Prophetic biography acquired a special status, above and beyond any other. Indeed, as we will see, the process of "constructing" Prophetic authority involved the assimilation into *ḥadīth* of materials that had been the preserve of non-Prophetic *sunan*.

The *sunan* constituted in themselves a source of the law even as the search for Prophetic Sunna got underway. Yet, by the end of the first century (ca. 715 AD), Prophetic Sunna had emerged as the queen of all *sunan*, though not of the legal sources on the whole. Hence the recently emerging preference for Prophetic Sunna did not amount to the proposition that law was exclusively or largely based on it, for the available Prophetic *ḥadīth* were as yet insufficient to constitute the basis of a substantial doctrine of positive law. Furthermore, the mere fact that men

[50] See chapter 2, section 3 above.

of learning should have coveted the Prophet's Sunna did not necessarily make it, historically or logically, an automatic source of the law. True, the Prophet's standing progressively gained prestige from the beginning, but his Sunna had largely been intermeshed with the other *sunan*. Nor were these *sunan* seen as a distinct source of law or genre, since they were regarded as a natural extension of the Prophet's legacy. The *sunan* of the Companions and the caliphs – which formed the basis of legal practice in the garrison towns and provinces – were thought to reflect first-hand knowledge of what the Prophet said or did, or of what he would have done in a particular case needing a solution. The Companions and early caliphs were thus seen as invested with the highest knowledge of the Prophet and his ways, and their *sunan* therefore represented – in one important and fundamental sense – a rich guide to legal conduct. (This also explains why – during the second/eighth century – their narratives were projected back onto the Prophet, as part of what some modern scholars have unjustifiably characterized as a process of *ḥadīth* forgery.)

The relationship between Prophetic Sunna and *sunan* may be illustrated by the following anecdote. When Ṣāliḥ b. Kaysān and Shihāb al-Din Zuhrī collaborated in an effort to collect the *sunan*, they reportedly disagreed as to whether or not the Companions' *sunan* should be part of their project. Zuhrī, who deemed the incorporation of these *sunan* necessary, finally prevailed, and a collection of both types of *sunan* – Prophetic and Companion – was made.[51] Yet, the very fact that such a disagreement broke out suggests – especially in light of the centrality of the Companions' *sunan* during the first century – that these *sunan* were entering into a phase in which they were increasingly contested, thereby losing prestige in favor of Prophetic Sunna. It also suggests that this latter, already a component of *sunan*, had just set out on the path that eventually would lead it to a privileged position. For while, qualitatively, the Prophetic materials represented a superior authority to many specialists, quantitatively such materials were still relatively small. In one of the most comprehensive registers of Zuhrī's transmitted doctrines, the majority of references go back to the Companions, not to the Prophet.[52]

This quantitative disadvantage, however, is only one indication of the fact that by the end of the first century (ca. 715 AD) Prophetic Sunna was

[51] M. J. Kister, "... *lā taqraʾū l-qurʾāna ʿalā l-muṣḥafiyyīn wa-lā taḥmilū l-ʿilma ʿani l-ṣaḥafiyyīn* ...: Some Notes on the Transmission of *Ḥadīth*," *Jerusalem Studies in Arabic and Islam*, 22 (1998): 127–62, at 136.

[52] See Motzki, "Fiqh des–Zuhrī," 12.

still far from being regarded as an exclusive source of law. At this stage, it was even sometimes used without referring to any specific content, in a manner similar to that in which other *sunan* had often been used. For instance, in Ḥasan al-Baṣrī's famous tract (properly known as *al-Risāla* and composed around 85/704), the Quran is the only yardstick of truth, for "any opinion that is not based on the Quran is erroneous."[53] Yet, Baṣrī does refer to the Sunna of the Prophet and gives it special importance without, however, adducing any *ḥadīth*.[54] In such references, the Prophet's conduct had the status of an exemplary model, one to be followed as the best example of the forebears' ways.

In this context, it is important to note that *ḥadīth* was not yet synonymous with the verbal expression of Prophetic Sunna. Some *ḥadīth*s were seen to contradict the widespread knowledge of established Sunna or *sunan* (especially when these constituted the basis of legal practice in the garrison towns and Medina), a fact to be expected in a milieu in which Prophetic biography eventually became the concern of a multitude of story-tellers, traditionists, judges, jurists and others. In an environment where fabrications of Prophetic materials were known to be widespread, it was inevitable that some circulated reports came to contradict local knowledge of the Sunna/*sunan,* knowledge that was transmitted mostly through practice and not orally.

Yet, many of the references to Prophetic Sunna did have specific content, at least insofar as law was concerned. Although these formed a relatively small portion of legal doctrine, their importance is attested by the reported activity of the caliph ʿUmar II, who is credited with one of the earliest attempts to collect Prophetic *ḥadīth*.[55] As part of this effort, he commissioned a number of scholars and probably governors to "look for what there is of the *ḥadīth* of the Apostle and of his Sunna."[56] The caliph, a highly learned man, reportedly worked on the project, also collecting *ḥadīth*. But the larger task of coordinating this material was assigned to Zuhrī. Upon completion, copies of the compilation were made and sent to each province or city for the benefit of judges and administrators.[57] None of these documents seems to have survived intact, nor is there any trace of

[53] Schacht, *Origins*, 141.
[54] Ibid., 74.
[55] On Muslim narratives claiming an early recording of *ḥadīth*, see Kister, "*lā taqraʾū l-qurʾāna* . . . ," 127–38.
[56] Nabia Abbott, *Studies in Arabic Literary Papyri*, vol. II: *Qurʾānic Commentary and Tradition* (Chicago: University of Chicago Press, 1967), 26.
[57] Ibid., 30–31; Kister, "*lā taqraʾū l-qurʾāna* . . . ," 156.

their later transmission. But it seems beyond doubt that Zuhrī, ʿUmar II's chief scholar, wrote down[58] a vast quantity of *ḥadīth*s and that he was engaged in transmitting and teaching these materials.[59]

The memorizing and writing down of *ḥadīth* thus emerged as a significant activity within and without the sphere of law. Nearly all the 418 Companions[60] and their children (mainly sons) participated at least to some extent in transmitting Prophetic *ḥadīth*. A large number of these persons transmitted no more than a pair of *ḥadīth*s, or perhaps only a few. Of the remainder, several are credited with a large number of transmissions, notably ʿAbd Allāh b. ʿUmar, Anas b. Mālik, Ibn ʿAbbās, Abū Hurayra, Ibn Masʿūd, ʿUmar b. al-Khaṭṭāb (ʿUmar I), ʿAlī and ʿUthmān.[61] Furthermore, the dispersal of the Companions – 188 of whom are reported to have migrated from Medina and Mecca to Iraq, Syria, Egypt and Khurāsān – had an effect on the interest in *ḥadīth*, which seems roughly to have corresponded with the geographical distribution of the legal specialists. A statistical survey of an early source – which affords us a list of traditionists who flourished roughly between 80 and 120 (ca. 700–35 AD) – reveals the following: Kūfa claimed 28 percent of *ḥadīth* transmitters; Baṣra 27 percent; Medina 24 percent; Syria 12 percent; Mecca 5 percent; Egypt 3 percent; and Khurāsān and other locales less than 1 percent. Note that the Hejaz (Medina and Mecca) claimed nearly a third of both legal specialists and traditionists; Kūfa and Baṣra shared about the same numbers but had a few more of the latter than of the former. So did Syria, which claimed about 20 percent more traditionists than it had legal specialists. (In absolute numbers, however, the traditionists were far more numerous than the legists). Yemen, on the other hand, had 6 percent of the total number of legal specialists but hardly figures in our sources as a hive of traditionist activity.[62]

[58] The writing down of *ḥadīth* in the early period appears to have been a widespread practice. It was not uncommon for the scholars of a town to commit to writing the *ḥadīth*s that they heard from a traditionist in transit. When the Yemenite scholar ʿUthmān b. Ḥāḍir arrived in Mecca, the local scholars are reported to have written down his *ḥadīth*. On the other hand, some scholars, such as ʿAbd Allāh b. Dhakwān (d. 130/747), did not possess a good memory and used writing to retain the *ḥadīth* they heard. Ibn Ḥibbān, *Mashāhīr*, 113, 124 (for Ibn Ḥāḍir), 133, 135 (for Ibn Dhakwān), 136, 141, 199 and *passim*; Wakiʿ, *Akhbār*, I, 328.

[59] Motzki, "Fiqh des–Zuhrī"; Kister, "*lā taqraʾū l-qurʾāna* . . . ," 158.

[60] Listed by Ibn Ḥibbān, *Mashāhīr*.

[61] It is interesting to note the nearly complete absence of Abū Bakr from the list of these Companions, a phenomenon that deserves further investigation.

[62] This should be considered in conjunction with the fact that Ibn Ḥibbān is not consistent in identifying the geographical affiliations of traditionists.

In addition to the geographical configuration, these data also show that in relative and absolute numbers, the traditionists' activity was far more substantial and could be said to have involved a larger proportion of the population than that represented by the legal specialists. Furthermore, these data correct the view of some scholars[63] that the Hejaz lagged behind Kūfa and Baṣra as a locus of traditionist and legal activity.

Thus, Muslim men of religious learning were certainly engulfed by the evolving notions of a Prophetic Sunna that was becoming superior to its near relations, the *sunan*. The sacred nature of this Sunna – which reflected the dramatic rise in Prophetic authority – made it the focus of interest of many groups, including the story-tellers who contributed to it both legendary and factual elements. False attributions to the Prophet were made through both fabrications of subject matter and chains of transmission. In fact, the increasing importance and authority of *ḥadīth* as an embodiment of Prophetic Sunna made it attractive to the Umayyad – as well as the early ʿAbbāsid – caliphs as a tool for enhancing their legitimacy *vis-a-vis* their many opponents. As part of their efforts to enlist the support of the religious scholars[64] – including the legal specialists – they endeavored (as we will see in chapter 8) to gather around them traditionists and jurists who would be willing and ready to collect and promote any *ḥadīth* supportive of their rule, whether true or spurious. Although this policy did encourage the collection and writing of *ḥadīth*s, it also had the effect of contributing to the intensification of forgery. Even the names of transmitters were occasionally fabricated. The case of the traditionist Uways b. ʿĀmir must suffice to illustrate this point. One of the earliest and most knowledgeable authorities dealing with *ḥadīth* transmitters describes him as a Yemenite who lived in Kūfa. But the sources cannot agree on whether he died in Mecca or in Damascus. Some *ḥadīth* scholars, our authority declares, have even denied "his having ever existed in this world."[65] On the other hand, even some of the most distinguished scholars, whose historicity cannot be doubted, were responsible for injecting false materials into this Sunna, to be rejected later by the *ḥadīth* experts. Of these scholars no less than Qatāda b. Diʿāma, Ḥasan al-Baṣrī and Ḥabīb b. Thābit (d. 119/737) are cited in technical *ḥadīth* criticism as mendacious, having attributed to

[63] Schacht, *Origins*, 243 and *passim*.

[64] To be read with caution, on the relations between caliphs and religious scholars during this period, is K. ʿAthamina, "The ʿUlama in the Opposition: The 'Stick and the Carrot' Policy in Early Islam," *Islamic Quarterly*, 36, 3 (1992): 153–78, esp. at 154–61.

[65] Ibn Ḥibbān, *Thiqāt*, 15.

the Prophet a number of *ḥadīth*s that were rejected as inauthentic.[66] It must be stressed, however, that notwithstanding these failings, the very same scholars are depicted in the sources as pious men whose contributions to religious learning were undeniable.

4. PROTO-TRADITIONALISM VS. RATIONALISM

It must first be stressed that the notion of rationalism or rationalistic jurisprudence is by no means a philosophical one. Rather, rationalism in Islamic jurisprudence merely signifies a perception of an attitude toward legal issues that is dictated by rational, pragmatic and practical considerations. Put differently, rationalism (always a description by the "Other") is substantive legal reasoning that, for the most part, does not directly ground itself in what came later to be recognized as the valid textual sources (namely, the Quran and Prophetic *ḥadīth*/Sunna). On the other hand, the traditionalists (*ahl al-ḥadīth*; often a self-description) were those who held that law must rest squarely on Prophetic *ḥadīth*, the Quran being taken for granted by both rationalists (*ahl al-ra'y*) and traditionalists. The traditionalists therefore must not be confused with the traditionists, whose main occupation was to collect, study and transmit *ḥadīth*. In other words, a traditionist might either be a rationalist or a traditionalist, depending on his point of view.

The methodological awareness of the traditionalists as defined in the previous paragraph was a development belonging to the second half of the second century H, and cannot be said to have crystallized any earlier. Only the vaguest beginnings of this trend can be detected in the first part of the century, a time when the proto-traditionalists were inclined to support some of their legal views by reference to Prophetic and Companion reports, unlike their counterparts, the so-called rationalists. Nevertheless, the proto-traditionalists had not yet come to the point at which they would insist upon exclusive reliance on Prophetic *ḥadīth*, or even on the reports of Companions and Successors.

The definition of rationalism makes it clear that this attribute and those who were given this label, i.e., the rationalists (*ahl al-ra'y*), were recognized in terms of their non-reliance upon *ḥadīth*. The definition is then a negative one: A rationalist is one who does not rely, or tends not to rely, on *ḥadīth*. Thus, there could not have been an identifiable group of

[66] Ibn Ḥibbān, *Mashāhīr*, 96, 145; Ibn Ḥibbān, *Thiqāt*, 33–34, 37, 39, 41, 43, 44, 49, 53, 90, 163, 222; Ibn Khallikān, *Wafayāt*, I, 219.

rationalists without *ḥadīth* having first evolved, for it was this evolution that gave rise to the binary opposites *ḥadīth/raʾy*. The faintest tendency to draw such an opposition appears to have surfaced at the turn of the first century H (ca. 715 AD) or shortly thereafter, at which time the pattern starts to become clear: The more *ḥadīth* spread, and the more important it became, the sharper the conflict between the traditionalists and the rationalists.

It must be remembered that before the rise of *ḥadīth* – which signaled an increase in the importance of Prophetic Sunna – rationalist reasoning (*raʾy*) was viewed in a positive light. The term *raʾy* was used to indicate sound and considered opinion, and we have therefore rendered it into English as "discretionary reasoning." To be erroneous, therefore, "opinion" had at that time to be qualified by a negative attribute, for its natural, default status was clearly positive.[67] The poet ʿAbd Allāh b. Shaddād al-Laythī (d. 83/702) regarded the approval accorded by the *ahl al-raʾy* (the people of good sense) to be a desideratum in acquiring a good reputation in society.[68] Even ʿUmar II, who was later associated with traditionalist tendencies,[69] is reported to have ordered one of his judges to solve certain problems through his *raʾy*.[70] And when the Baṣran judge Iyās b. Muʿāwiya was asked whether he was fond (*muʿjab*) of his own *raʾy*, he is said to have remarked: "Had I not been fond of my *raʾy*, I would not have decided cases in accordance with it."[71]

The fairly recent emergence of *ḥadīth* obviously could not have affected the established forms of legal reasoning. *Raʾy* continued to dominate throughout the early period and until the middle of the second/eighth century. According to one scholar's calculation, about two-thirds of Zuhrī's transmitted doctrine contained *raʾy* and only one-third consisted of reports from earlier authorities. Qatāda's *raʾy*, by the same estimate, amounted to 62 percent of his own transmitted doctrine. Even more significant is the fact that 84 percent of the remaining portion – i.e., 32 percent of his total doctrine – expresses the *raʾy* of earlier authorities.[72]

But the positive connotation of *raʾy* was to change with the passage of time. The challenge posed by the traditionalists had the effect of gradually

[67] Ibn Aʿtham, *Futūḥ*, I, 172, 176, 178 and *passim*.
[68] See Sayyid Aḥmad al-Hāshimī, *Jawāhir al-Adab fī Adabiyyāt wa-Inshāʾ Lughat al-ʿArab*, 2 vols. (Beirut: Muʾassasat al-Risāla, n.d.), I, 190; Ibn Aʿtham, *Futūḥ*, I, 176.
[69] See Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 15.
[70] Kindī, *Akhbār*, 334.
[71] Wakīʿ, *Akhbār*, I, 346.
[72] Motzki, "Fiqh des–Zuhrī," 6.

coloring this term in a negative hue, changing its meaning from "discretionary reasoning" into "arbitrary reasoning" or "fallible human thought," i.e., a way of thinking that failed to consider the authoritative texts, which were steadily acquiring a reputation as a more secure source of legal knowledge. A single Prophetic voice on which all Muslims could rely, the traditionalists claimed, was superior to the personal reasoning of individual judges whose fallibility could be demonstrated by the fact of their widely diverse opinions on any given issue. In short, the more the *ḥadīth*s circulated, the greater the traditionalists' power became, and, necessarily, the more negative the connotations associated with *ra'y*. Indeed, it can also be argued that the more powerful the traditionalists became, the more *ḥadīth*s went into circulation. In terms of causality, therefore, the complex relationship between *ḥadīth* production and the growth of the traditionalist movement was dialectical; namely, one element fed on the other.

The rise of *ḥadīth* was concomitant with an intense development in theological debate over issues of divine will, power and predestination.[73] Problems of law and theology were at several points necessarily interconnected, as the later intellectual tradition came to demonstrate. From the traditionalist viewpoint, the insistence on *ra'y* was no longer viewed as insistence on discretionary reasoning ultimately based on *'ilm*, but rather as a deliberate refusal to acknowledge the divine imperative. In light of the tone of theological debates, "discretionary reasoning" was regarded as directly connoting "rational reasoning," this latter meaning a human, not divine, foundation of law. Hence, the appellation *ahl al-ra'y* now came to signify "rationalists" rather than "careful reasoners." (A critical source-analysis must therefore recognize that the later competing categories of traditionalists/rationalists are often projected backwards onto early sources and narratives, thereby producing an anachronistic account of the emergence of traditionist/traditionalist activity and, consequently, distorting the originally positive image of "discretionary opinion.")

5. CONCLUSIONS

By the second decade of the second century (730s AD), several developments came together to produce a distinctly new phase in the life of Islamic law. The Companions and those who felt strongly about the message of the

[73] See W. M. Watt, *The Formative Period of Islamic Thought* (Edinburgh: Edinburgh University Press, 1973), 82–118, and *passim*.

new religion had already embarked on defining Islam according to what they perceived to be the Quranic spirit, which had already claimed dogmatic supremacy from the very beginning. The generation that flourished between 80 and 120 (ca. 700–35 AH) made of piety a field of knowledge, for piety dictated behavior in keeping with the Quran and the good example of the predecessors (the all-important *sunan māḍiya*). Considered, discretionary opinion was part and parcel of this piety, since it often took into consideration the Quran and the exemplary models that were so highly recommended. At the very least, it could not have violated in any marked way the then widely accepted Quranic injunctions or the established ways of the predecessors. Any such violation would have been socially and politically – if not legally – unwarranted and would have met with opposition from the traditional, customary and venerated values of the Arabs. However, adherence to these legal sources was not even a conscious methodological act; considered opinion, the Quran and the *sunan* had so thoroughly permeated the ethos according to which judges operated and legally minded scholars lived that they had become paradigmatic.

As they had slowly developed into a body of knowledge, these religious values began to reign supreme, and those who made it their concern to study, articulate and impart this knowledge acquired both a special social status and a position of privileged epistemic authority. In other words, those men in possession of a greater store of knowledge grew more influential than others less learned, gaining in the process – by the sheer virtuousness of their knowledge – an authority that began to challenge the legal (but not political) authority of the caliphs (although this is not to say that caliphal authority was either integral or exclusive). Whether Arab or non-Arab, rich or poor, white or black, scholars emerged as distinguished leaders, men of integrity and rectitude by virtue of their knowledge, and their knowledge alone.

The emergence of legal specialists was one development that got underway once Muslims began engaging in religious discussions, story-telling and instruction in mosques. Another, concomitant, development was the gradual specialization of the *qāḍī*'s office, a specialization dictated by the fact that the Arab conquerors' expansion and settlement in the new territories brought with it an unprecedented volume of litigation, including legally complex cases usually associated with sedentary styles of life. Whereas prior to 80/699 it was mainly proto-*qāḍī*s who dominated the field of conflict resolution, after this period it was the *qāḍī*s who mainly staffed and operated the nascent judicial system. This operation was not

isolated from the emerging circles of the legal specialists. Not only did some judges themselves belong to these circles, but the specialists also began to be seen as essential to the courtroom. Whence an early doctrine began to surface: a judge must consult the legal specialists, the *fuqahāʾ*, especially if he is not one of them.

A third development, which had started a couple of decades earlier, i.e., during the 60s/680s, was the rise of Prophetic authority as distinct from the authority of other *sunan*. With the increasing assimilation of the Quran and the articulation of the finer points in it, Muḥammad's authority as Prophet was increasingly augmented. The many Quranic injunctions to abide by the Prophet's example, coupled with the Arab emphasis on "the ways of the predecessors," generated the question: What would the Prophet have said or done were he to face a given issue? It should be abundantly clear that an answer to this question did not mean a change in positive law or replacement of the existing sources on which the judges drew. But it did mean that an evolving body of Prophetic narrative was beginning to surface independently of other narratives and practices. The Prophetic model may have, *in terms of authority*, challenged and competed with other *sunan* as well as with *raʾy*, but it was more often the case that the *sunan* and the *raʾy* constituted the subject matter from which the content of Prophetic narrative was derived. Prophetic *ḥadīth* was a logical substitution for these sources, since the latter – by virtue of the Companions' intimate knowledge of the Prophet – represented to Muslims an immediate extension of the former.

And here the embryo of yet another significant development began to form. The increasingly active groups of so-called traditionists – who transmitted, *inter alia*, Prophetic and Companions' materials – began to see *raʾy* as the shunning of religious values. By about 120 (ca. 740 AD), all that this meant was a mere traditionist disgruntlement with *raʾy*, but this was to develop during the next two centuries into one of the most intense intellectual and legal battles known to Islam and an issue that ultimately affected and determined the course of the religion's development. This was the traditionalist–rationalist conflict.