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THE EXISTENCE OF ISLAMIC LAW IN THE FIRST CENTURY OF THE HIJRA: A STUDY IN AUTHENTICITY

by

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A Thesis Submitted to the
Faculty of Graduate Studies and Research
in partial fulfilment of the requirements
for the degree of Master of Arts
in Islamic Studies

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Résumé

Ce mémoire est une tentative de remise en question de l'hypothèse établie de Joseph Schacht qui affirme que la loi islamique, telle que nous la connaissons actuellement, n'existait pas durant la plus grande partie du premier siècle de l'Hégire. Son argumentation repose sur la notion que le Qur'an fut utilisé qu'à titre de source légale secondaire et que les oeuvres du Prophète furent libre de tout contexte légal. Ainsi, les musulmans de cette époque se sont surtout référés à la loi coutumière alors appliquée en Arabie pré-islamique. Par conséquant, Schacht affirme que la loi islamique a commencé à se développer à partir du premier et du second siècle suivant l'Hégire, suite à des mesures prises par les Califes Ummayades et leurs gouverneurs. Ceux-ci vont alors déléguer le pouvoir judiciaire aux *qadis* -c'est-à-dire, les experts légaux- qui formuleront de nombreuses décisions légales basées sur leurs propres interprétations et qui seront plus tard reconnues en tant que loi islamique.

En opposition à cette hypothèse, certains spécialistes tels que S.D. Goitein, N.J. Coulson, David S. Powers, M.M. al-Azami ainsi que Wael B. Hallaq ont exposé certaines preuves démontrant que la loi islamique existait déjà pendant la vie du Prophète. Le Qur'an a aussi joué un rôle significatif dans la formulation des lois de même que dans la résolution des problèmes légaux aux tous débuts de cette période. Les personalités centrales qui appliqueront une telle loi seront le Prophète lui-même ainsi que ses Compagnons qui vont lui succéder à titre de *muftis*. Pour cette raison, tous les actes du Prophète, incluant les affaires légales, furent transmises oralement et enregistrées sous une forme écrite. Cette transmission est redevable au système de

l'*isnad* qui fut introduite déjà à l'époque du Prophète. Suite à la mort de Muhammad, ses Compagnons poursuivèrent ces activités légales en émettant des jugements qui se développeront subséquemment pour devenir un modèle de législation islamique.

ABSTRACT

This thesis is an attempt to question the established thesis of Joseph Schacht that Islamic law, as we know now, did not exist during the greater part of the first century of the Hijra. His argument rests on the notion that the Qur'ān was only utilized as a secondary source in legal matters, and the Prophet's works were out of legal context. Thus, Muslims at that time mostly relied on customary law which was practiced in pre-Islamic Arabia. Consequently, he claims that Islamic law began to develop at the end of the first century of the Hijra or toward the second century of the Hijra, as a result of the measures taken by the Umayyad Caliphs and their Governors; they delegated the judicial power to the *qāḍīs*, the legal specialist, who made many legal decisions based on their own creation which subsequently came to be known as Islamic law.

Contrary to this thesis, some scholars, such as S. D. Goitein, N. J. Coulson, David S. Powers, M. M. al-Azami, and Wael B. Hallaq have shown some evidence to argue that Islamic law did exist during the life time of the Prophet. The Qur'ān has played a significant role in formulating law as well as solving legal problems in the very beginning of the period. The key figure to apply such law is the Prophet himself and his companions, who, after him, acted as *muftīs*. Moreover, all the Prophet's action including those related to legal matters had been transmitted orally and recorded in a written form. This transmission is owed to the *isnād* system which was introduced since the life time of the Prophet. After the Prophet's death, his companions pursued these legal activities by issuing legal decision which subsequently developed and become a model of Islamic law.

THE EXISTENCE OF ISLAMIC LAW IN THE FIRST CENTURY OF THE HIJRA: A STUDY IN AUTHENTICITY

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I would like to address my gratitude to OTO Bappenas (Overseas Training Office of the National Development Board of Indonesia) who have given me financial support to study at the Institute of Islamic Studies, McGill University. This opportunity has given me a chance to comprehend Islam, particularly Islamic law, from Western perspective.

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INTRODUCTION

Islamic law, which is regarded as the sacred law among Muslims, includes all religious duties, which come from Allāh, and are incumbent upon Muslims in all aspects of their lives. It comprises on equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules.[1] Western scholars have discussed the question of the existence of these rules and ordinances, and whether or not they originated during the life time of the Prophet, the first four Caliphs, and the Umayyad Caliphate. Different opinions have been expressed on this question, perhaps the most influential view is still that of Joseph Schacht, whose guiding concepts about the nature and purpose of Islamic jurisprudence are rooted in the work of C. Snouck Hurgronje.[2] Schacht argues that "[d]uring the greater part of the first century, Islamic law, in the technical meaning of the term, did not yet exist."[3] According to him,

> Muḥammad had little reason to change the customary law. His aim as a Prophet was not to create a new system of laws, it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the day of judgement and enter to Paradise....His authority was not legal, but for believers, religious and, for the lukewarm, political.[4]

In so arguing, Schacht virtually ignores the Qur'ānic legislation, to which he devoted less than four pages in his classic work *The Origins of Muhammadan Jurisprudence* (224-227). As for *ḥadīth*, Schacht maintains that it came into existence only towards the first century or in the second century A.H. He argues therefore that the

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[1]Joseph Schacht, *An Introduction to Islamic law* (Oxford : Clarendon, 1964), 1.

[2]R. Stephen Humphreys, *Islamic History: A Framework for Inquiry* (Princeton: Princenton University Press, 1991), 214.

[3]Schacht, *Introduction*, 19.

[4]Ibid, 11.

actual foundations of Islamic law were laid not by Muḥammad and his followers, but by the early *qaḍīs*, who were legal specialists appointed by the Umayyad Governors. It was the *qāḍīs* who transformed the popular and administrative practices of the Umayyads into the religious law of Islam.[5] Some of Schacht's hyphoteses, such as the tendency of *isnāds* to grow backwards and, especially, the common-link theory have been supported by G. H. A. Juynboll, though he is also critical of Schacht in certain respects.[6] Schacht's approach to the origins of Islamic Law was inspired by Ignaz Goldziher's famous study on the development of the *ḥadīth* in his *Muslim Studies*, originally published in 1890.

Schacht's position on Islamic Law in the first century has been criticized by several scholars. David S. Powers argues "that any attempt to investigate the origins of Islamic Law should take the Qur'ān as its starting point."[7] Taking the law of inheritance as his example, Powers demonstrated that Islamic Law did, in fact, begin to develop during the Prophet's lifetime.[8]

Earlier, Noel J. Coulson had suggested that "Muḥammad must have been faced during his rule at Medina with a variety of legal problems, particularly those which, as we have noted, arose out of the terms of the Qur'ān itself."[9] Likewise, to S. D. Goitein,

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[5]Schacht, *Introduction*, 23-27.

[6]G. H. A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and authorship of early Ḥadīth* (Cambridge: Cambridge University Press, 1983), 207.

[7]David S. Powers, *Studies in Qur'ān and Ḥadith: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), xii.

[8]Ibid.

[9]N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 22.

the idea of the sharīʿa was not the result of post-Qurʾānic developments, but was formulated by Muḥammad himself.[10]

In discussing the controversial question whether Islamic law had already existed in the first century, I will first examine the view--best represented by Schacht-- that it did not. The second chapter will discuss the views of those who argue for the existence of Islamic Law in the first century. These scholars include, but are not limited to, David S. Powers, N. J. Coulson, M. M. al-Azami, G. H. A. Juynboll and Nabia Abbott. The third chapter will review the strengths and weakness of both positions, and the last will offer concluding observations on the problem at issue.

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[10]S. D. Goitein, *Studies in Islamic History & Institutions* (Leiden : E. J. Brill, 1968), 133.

CHAPTER ONE

THE CASE AGAINST THE EXISTENCE OF ISLAMIC LAW IN THE FIRST CENTURY OF THE HIJRA

The existence of Islamic law in the first century of the Hijra and the role of the Prophet Muḥammad as a law maker have been doubted by most Western scholars and particularly specialists of Islamic legal studies, such as Christiaan Snouck Hurgronje,[1] Ignaz Goldziher[2] and Joseph Schacht. Building upon the work of his predecessors, Joseph Schacht[3] articulated this issue by stating that Islamic law did not yet exist in the first century of the Hijra. He argues that Muḥammad had no reason to change the customary law since his duty as the Prophet is to recommend one to do good deeds and interdict one from committing sin in order to pass the reckoning in the hereafter. He also investigated the authenticity of the prophetic traditions that led him to conclude that they came into existence only towards the end of the first century or in the beginning of the second century A. H. Thus, he argues that the actual foundations of Islamic law were

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[1]C. Snouck Hurgronje is known as the founder of Islamic legal studies in the West. For some of his work, see *Selected works of C. Snouck Hurgronje*, edited by G. H. Bousquet and Joseph Schacht (Leiden: E. J. Brill, 1957).

[2]Ignaz Goldziher's famous study "On the Development of the *Ḥadīth* " in *Muslim Studies*, ii (1971) originally published in 1890, inspired Joseph Schacht's approach to the origins of Islamic law.

[3]In his books *The Origins of Muhammadan Jurisprudence* and *An Introduction to Islamic law*, Schacht raises the issue whether or not Islamic law existed in the greater part of the first century of Islam. See the following reviews of his *Origins* : J. N. D. Anderson, *Die Welt des Islams* 2 (1952): 136; J. Robson, *The Muslim World* 42 (1952): 61-63; W. M. Watt, *Journal of the Royal Asiatic Society* (1952): 91; A. Jeffrey, *Middle East Journal* 5 (1951): 392-94. H. Ritter, *Oriens* 4 (1951): 308-12. H. A. R. Gibb, in *Journal of Comparative Legislation and International Law* (1951): 114-6; Alfred Guillaume, in *Bulletin of the School of Oriental and African Studies* 16 (1954): 176-7; S. V. Fitzgerald, in *The Law Quarterly Review* 69 (1953): 395-9.

laid not by Muḥammad and his followers, but by the early *qāḍīs*, the legal specialists appointed by the Umayyad Governors. It was the *qāḍīs* who transformed the popular and administrative practices of the Umayyads into the religious law of Islam.[4]

In reaching his conclusion, Schacht bases his arguments on the feature of the Qurʾānic legislation which is connected to the role of Muḥammad as a religious reformer in the rudimentary Muslim society; on the phenomenon of the first century of Islam where Islamic law began to take its nascent shape, followed by a political situation where the Umayyad played a significant role in the formulation of Islamic law; and on *sunna* and its related concept. In order to further comprehend Schacht's thesis, we will examine his arguments as follow.

Muḥammad and the Qurʾān

The starting point of Joseph Schacht's argument in supporting his thesis in negating the existence of Islamic law in the first century of the Hijra is Muḥammad and the Qurʾān. Proclaiming himself in Mecca as a messenger of God with a divine message, i.e., Islam, Muḥammad denied being a *kāhin*, i.e., a person exercising the power of arbitration among disputing parties in pre-Islamic Arab society. Nevertheless, according to Schacht, Muḥammad himself occasionally performed a similar role in the capacity of a *ḥakam*, dealing with diverse issues such as marriage (Q.4:35), etc.

This denial was due to Muḥammad himself who was not so satisfied with the limited role of being a ḥakam, but strove for more political power. That he gained after his migration to Medina. He established a new society there and fulfilled his political ambition. Therefore, Muḥammad was primarily concerned with political issues rather

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[4]Schacht, *Introduction*, 23-27.

than legal matters. As Joseph Schacht says: "His authority was not legal, but, for the believers, religious and, for the lukewarm, political."[5] Ignaz Goldziher also states :

> He did not cease to feel and practice the vocation of "warner" in his new surroundings, but prophecy took a new course. The Prophet was no longer a mere apocalyptic visionary. New circumstances had turned him into a fighter, a conqueror, a statesman. He organized the new and ever growing community. Islam as an institution received new form in Medina. It was here that the first lineament of Islamic society, law, and political order began to appear.[6]

To achieve his ambition of a political career, Muḥammad, according to Schacht, needed a system which combined legal duties and moral obligations generated by a religious spirit. In this case, Islam serves as the means through which Muḥammad as the Prophet expounded his mission to his people, calling upon them to guard themselves from sin in order to enter Paradise in the hereafter. Thus, it can be argued that Muḥammad did not need a definite legal system at the time; what he needed were religious and ethical principles only. Besides, he realized that the legislation of the Prophet was already accounted as an innovation in the law of Arabia. In this sense Muḥammad had little reason to change the existing customary law.[7] Perhaps Muḥammad was not interested in legal matters; according to C. Snouck Hurgronje "Muḥammad knew too well how little qualified he was for legislative work to undertake it unless absolutely necessary."[8] Tyan also holds the same view. He says: "When one glances through the work of Muḥammad one is easily convinced that he did not intend

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[5]Ibid, 11.

[6]Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. Andras and Ruth Hamori (New Jersey: Princeton University Press, 1981), 8.

[7]Schacht, *Introduction*, 11.

[8]Hurgronje, *Muhammadanism* (New York: Putnam, 1916), 60.

to institute a new judicial system nor to introduce a new system of legislation."[9] That he did not want to create a new legal system is proved by the existence of the borrowed elements[10] in his teaching, such as, the prohibition of taking interest which is certainly

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[9]E. Tyan, *Historie de l' organisation judiciare en pays d' Islam* (Leiden, 1960), 64, as cited by al-Azami in *On Schacht's Origins of muhammadan Jurisprudence* (Riyadh: King Saud University, 1985), 16.

[10]In his article "Foreign Elements in Ancient Islamic Law" in *the Journal of Comparative legislation and International Law*, 1950, 9-17, Joseph Schacht states that at least there are four legal systems which influenced Muhammadan law and jurisprudence viz. Persian Sassanian law, Roman Byzantine (including Roman Provincial) law, the canon law of the Eastern churches and Talmudic Law. Though according to him, it should be realized that these elements have been so thoroughly assimilated and Islamicised.

Schacht notes that while the influence of Persian Sassanian law was very little and remained hypothetical as well as the influence of the influence of the Eastern churches, the influences of Talmudic are easy to account for. The latter phenomenon could also be seen in the relationship between Roman and Islamic law. It seems that Schacht support the idea of Ignaz Goldziher who is of the opinion that the parallels between Roman and Islamic law occur in the field of legal concepts and principles and extend to fundamental ideas of legal sciences.

In so doing, Schacht is against Nallino who is of the opinion that any important influence Roman on ancient Islamic law was impossible and therefore non-existing, According to Nallino at least the outlines of a great part of the Islamic law of private must have existed among the people of Hijaz long before Muḥammad. In addition, he also claimed that Roman law was not applicable to the "multitudinous tribes of Ishmael."

In arguing about Nallino's ideas, Joseph Schacht stresses that Muhammadan legal science started in Iraq about 100 A. H. and Medina depend upon that in Iraq. The latter was deeply imbued with the spirit of Hellenistic civilization and at the same time was a great center of Talmudic learning. Moreover, Schacht stated that Greek logic also had its influence on Islamic legal science. He exemplified the principle of the *istiṣḥāb*, that is the presumption that legal status once established, continues until the contrary is proved.

To prove his argument even further, Schacht gave several examples. He claimed that the idea of "consensus of scholars" in Islamic legal sciences corresponds to the opinio prudentum of Roman law. Another instance is that there is a legal maxim "the children belong to the (marriage) bed." This maxim *ḥadīth* has a parallel in the Roman legal maxim "pater est quem nuptiae demonstrant." He also claimed that *rahn*, a security

inspired by his interaction with Jewish life in Medina, not by his reflections on the commercial practice of the Meccans, and the extension of the principle of retaliation from homicide to causing bodily harm (Q. 5: 45) is based on the Jewish old testament.[11]

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for the payment of a debt, inquired the institutions of *pignus* which was found by the Muslims in the conquered Byzantine provinces, and later on their early lawyers approved of a corresponding elementary definition of *rahn*.

Having presented these arguments, Schacht concludes that legal concepts and principles, including even fundamental ideas of legal science, entered Muhammadan law from outside, in particular from Roman law. Whether these influences amount to little or much is irrelevant, the important fact is that they did happen.

However, S. V. FitzGerald comes with a different conclusion from that of Schacht. He stated that there is not a single reference in any Islamic law book to any Roman authority. He criticized the idea that Islamic jurisprudence was born in the second century of the Hijra by stating that the Muhammadan law of inheritance had its root in the hands of Zaid b. Thābit, Abū Mūsa, Ibn Masᶜūd, ᶜUmar and ᶜAlī. This is to prove that thirty years following the Prophet's death Islamic jurisprudence had been introduced in Medina. Moreover he claims that the division between the *faqīhs*, lawyers and theologians, and the amirs, the leaders in war, dates from the very beginning of Islam.

FitzGerald also presents three general considerations to make his arguments even stronger. Firstly, from the evidence of language he claimed that Arabic no doubt is less given to borrowing words than other languages. Consequently, in the whole vast vocabulary of Islamic law there is not a single word borrowed from Latin or Greek, except for the instance of *qānūn* which means administrative regulation rather than law. A second consideration is that where as in Roman law the written document is premary evidence, Islamic law considers that the evidentiary value of writing is less than that of oral evidence. This evidence contradicts the idea of direct borrowing. A third consideration is that in the whole of Islamic legal literature there is no mention of any such source. Islamic law is the law of God, the only lawgiver; no human prince has any power of legislation. Finally, FitzGerald concludes that there is no such conspiracy and no reason whatever to suppose that the conscious sources of Islamic law are anything but exactly what the Muslim writers say they are.

[11]Schacht, *Introduction*, 13. See also his article "Foreign elements in Ancient Islamic Law" in *Journal of Comparative legislation and International Law* 32 (1950), 9-17.

The Qur'ān[12] itself indicates Muḥammad's interest through its legal verses, which mainly focus on ethics and legal norms such as keeping pledges and contracts, standing by one's testimony, not cheating. However, the Qur'ān does not provide further legal information and there are no legal effects on actions in the Qur'ān. The text of the Qur'ān does not elaborate on such questions as civil responsibilities[13] and conformity of actions to the law, or their violation. Neither does it stipulate a punishment for a wrong action or a wrongdoer, except that they will be punished in Hell. This is understandable because Islam, in Schacht's view, is a system of duties embracing ritual, legal, and moral obligation on the same stress. Thus if all these elements are completely applicable, there would be no need for a legal system in the narrow meaning of the term.[14]

An example of the ethical attitude of the Qur'ān towards legal matters is its injunctions on contracts. The Qur'ān merely asserts what had existed in pre-Islamic Arabia. Its stipulations include the writing of an agreement, bringing witnesses or giving a guarantee if a scribe was absent, or employing someone to fulfill an agreed contract or to return a deposit to its owner. In the same manner, the Qur'ān introduces the law of war which, to a great extent, still conforms to the general framework of pre-Islamic custom such as how the booty is to be distributed, and how the conquered area is to be treated. The Qur'ān also introduces family law in numerous verses, but its main concern

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[12]Schacht discusses the Qur'ānic legislation in less than four pages in *The origins of Muḥammadan jurisprudence* (224-227). Azami criticizes Schacht's ignorance of the Qur'ān as a fundamental error of his work.

[13]Schacht, *Introduction*, 12.

[14]Ibid, 11.

in this respect is to regulate behavior towards women and children, orphans and relatives, dependants and slaves. [15]

Consequently, one may assume that the legal concerns of the Qur'ān and Muḥammad's interest in political issues work hand in hand. The first step was to reform the inhuman treatment of women, children and orphans, as well as to halt the laxity of sexual morals and to strengthen the marriage. And the second was to extirpate pre-Islamic Arabian vices such as gambling, taking interest, and *khamar*. In turn, both the Qur'an and Muḥammad were concerned to provide solutions for new problems which had arisen in family law, in the law of retaliation, and in the law of war. This was intended to facilitate Muḥammad's political aims and to replace the structure of pagan society with an Islamic society. Therefore, it can be concluded that Muḥammad' s role in the formation of Islamic law was minor, at best. As J. N. D. Anderson states : "It is evident that Muḥammad himself made no attempt to work out any comprehensive legal system, a task for which he seems to have been singularly ill-suited; instead, he contented himself with what went littlc beyond 'ad hoc' amendments to the existing customary law".[16]

The first century of the Hijra

Having discussed Muḥammad and the Qur'ān, Joseph Schacht proceeds to the situation after the death of Muḥammad, when political power was held by the caliphs who acted to a great extent as the lawgivers of the community. At that time, the caliphs did not appoint *qāḍīs* and did not yet lay down the groundwork which could

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[15]Ibid, 12.

[16]J. N. D. Anderson, "Recent Developments in Sharī'a Law," *Muslim World*, 40, (1950), 245.

subsequently serve as the basis for the Islamic justice system and the administration of justice.[17] What they did was to continue the modification and completion of the ancient Arab system of arbitration. Juynboll maintains that it is generally accepted that the first four caliphs set their own standards. They ruled the community in the spirit of the Prophet, thinking of their own solutions to problems rather than meticulously copying his action.[18] For example, the first caliphs went beyond the sanctions enacted in the Qurʾān by punishing with flogging the authors of satirical poems directed against rival tribes and stoning to death for unlawful intercourse.[19]

Not only the system of arbitration but also the pre-Islamic idea of *sunna* reasserted itself in Islam and later became predominant in Muslim life. H. A. R Gibb states that the term *sunna* meant "the custom of the community conducted by oral transmission."[20] Actually, the Muslims, says Ignaz Goldziher, did not have to invent this concept and its practical importance. It was already well known to the ancient pagans of the period before Islam. To them *sunna* meant those rules which were in conformity with the tradition of the Arab world and the ancestral manners and custom.[21] For the ancient Arabs, *sunna* was the golden rule; whatever was customary

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[17]Ibid, 16.

[18]G. H. A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and authorship of early Ḥadīth* (Cambridge: Cambridge University Press, 1983), 15.

[19] According to Joseph Schacht this punishment does not occur in the Qurʾān and is obviously taken from Mosaic law. See his *Introduction*, 15.

[20]H. A. R. Gibb, *Mohammedanism*, ed. 2 (Oxford: Oxford University Press, 1970), 73-4.

[21] Goldziher, *Muhammedanische Studien*, Vol. 2, trans. S. M. Stern (London: 1967), 13.

was right and proper and whatever the forefathers had done deserved to be imitated.[22] Accordingly, the idea of *sunna* leaves no room for innovation and rejects every single innovation, of which Islam itself can be counted as one. Therefore Islam had to overcome this obstacle. But, Schacht argues,

> [0]nce Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a *sunna*. This ancient Arab concept of *sunna* was to become one of the central concepts of Islamic law.[23]

According to Goldziher, the term *sunna* is still used in the same manner in pre-Islamic Arabia which had been little influenced by Islam. Among the pious successors of Muḥammad and in the early Islamic society *sunna* came to mean anything that could be proven to have been the practice of the Prophet and his oldest disciples. "Just as the pagan Arab adhered to the *sunna* of his ancestors, so was the Muslim community enjoined to uphold and follow the new *sunna*. Thus the Muslim idea of *sunna* is a variant of an ancient Arab concept."[24]

The first two caliphs, Abū Bakr and ᶜUmar used the idea of *sunna* not in legal matters but rather in political doctrine, and the word came to the policy and

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[22]Schacht, *Introduction*, 17. See also idem., "The law" In *Unity and Variety in Muslim Civilization*, ed. G. E. Von Grunebaum, Chicago: University of Chicago Press, 1955. 69; his "Pre Islamic Background and Early Development of Jurisprudence," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955), 34.

[23]Schacht, *Introduction*, 17.

[24]Goldziher, *Muhammedanische Studien*, Vol. 2, 13 ; Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials* (Albany: State University of New York Press, 1975), 13.

administration of the caliph. The *sunna* of the Prophet at the time used to link the *sunna* of Abū Bakr and ʿUmar to the Qurʾān. The first caliphs continued to use the idea of *sunna* and mixed it with the *sunna* of the conquered territories outside Arabia, just as during Muḥammad's lifetime the *sunna* of Arab society was used to solve problems of Muslim society. This is to prove that Islam in the conquered areas was and continued to be a flexible religion. "As far as there were no religious or moral objections to specific transactions or modes of behavior, the technical aspects of law were a matter of indifference to the Muslims."[25] "[T]he treatment of tolerated religions, the methods of taxation, and the institutions of *emphyteuis* and of *waqf*" are some instances of legal practices which originated from the traditions of the conquered areas.[26] Schacht, therefore, concludes that "during the greater part of the first century Islamic law, in the technical meaning of the term, did not as yet exist. As had been the case in the time of the Prophet, law as such fell outside the sphere of religion."[27]

The Umayyads supplanted the rule of the caliphs of Medina in the middle of the first Islamic century. The Umayyad period is considered by Schacht as an important period in the development of Islamic law. The Umayyads were not concerned with religion and religious law, instead they focused on the political administration of their domains. However, "they and their governors were responsible for developing a number of essential features of Islamic worship and ritual, of which they had found only rudimentary elements."[28]

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[25]Joseph Schacht, *Introduction*, 19.

[26]Ibid.

[27]Ibid.

[28]Ibid, 23.

The Umayyads, in dealing with war against their enemies, established regulations and administrative law, such as the law of war and of fiscal administration. One example is the restriction of legacies to one-third of the estate, which meant that when a person died without a known next of kin, two thirds of the estate went to the public treasury.[29]

They also took a very significant step regarding the administration of the law by appointing Islamic judges or *qāḍīs*. As a matter of fact, it was the governor who had full authority over his province, administratively, legislatively and judicially, but he delegated his judicial authority to the *qāḍī* as the law giver. The jurisdiction of the *qāḍīs* extended to Muslims only. In making their decisions, which subsequently became the foundations of Islamic law, the *qāḍīs* based their judgement on their own creation. They also improved their ability concerning legal decisions by combining the customary law with the spirit of the Qurʾān and the contemporary legal norms in Muslim societies at the time.

According to Schacht, in the long run, this duty needed more specialists who were versed in legal matters. They were not trained for the purpose, but were individuals concerned with legal matters. By examining the customary law, along with the Qurʾān and Islamic norms, they eventually laid down the so-called Islamic way of life. They also surveyed the field of the law, including the administrative and popular practices, and took the acceptable ones and modified or rejected the others. The result of their work was transformed into Islamic law; this resulting ideal theory depend on the caliph, the governor or the individual Muslim to apply it into practice.[30] Ibrāhīm al-Nakhaʿī of Kūfa was a specialist in Islamic law. He gave responses to queries concerning rituals,

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[29]Ibid, 24.

[30]Ibid, 27.

family matters, but not in technical matters of law. His contemporaries did likewise. In other words, they acted solely as the *muftis* who occasionally criticized the regulations of the Umayyad government.[31] Having examined the legal and practical administration of the Umayyad period, Joseph Schacht concludes that Islamic law in fact originated at the time of the Umayyads.[32]

Sunna and the Living Tradition

Let us now go back to the concept of the prophetic *sunna* which is considered as an authentic source by the traditionalists. According to Schacht, the term '*sunna* of the Prophet' appeared authentically in a letter addressed by the Khāriji leader ᶜAbd Allāh b. Ibāḍ to the Umayyad caliph ᶜAbd al-Malik about 76 A. H./695 A. D.; Ḥasan al-Baṣri also addressed his treatise to the latter, using the same term, but with a theological connotation.[33] Goldziher has shown that this originally pagan term was taken over and adopted by Islam,[34] and Margoliouth has concluded that *sunna* as a principle of law originally meant the ideal or normative usage of the community, and only later, did it acquire the restricted meaning of precedents set by the Prophet.[35]

Schacht believes that not until seven decades of Islamic history had passed did the concept of the prophetic *sunna* become familiar in Muslim society. To support this idea, Schacht maintains that the term *sunna* itself means nothing more than 'precedent,

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[31]Ibid.

[32]Ibid.

[33]Ibid, 18.

[34]Goldziher, "The principle of Law in Islam," in *The Historians' History of the world* 8, 1904, 294-304.

[35]D. S. Morgoliouth, *Early development of Mohammedanism* (London: 1914), 69 f., 75.

or way of life'.[36] He quotes Ibn Muqaffaᶜ, a secretary of state in late Umayyad and early ᶜAbbasid times, who was of the opinion that *sunna*, as it was understood at the time, was based not on authentic precedents laid down by the Prophet and the first caliphs but to a great extent on the administrative regulations of the Umayyad government. It was the caliph who was free to fix and codify the alleged *sunna*.[37]

Schacht calls the *sunna* which was understood by the ancient schools of law the 'living tradition'. He gives evidence from the ancient Medinese texts, for instance, *Muwaṭṭaʾ* of Mālik, iii. 173 f.,[38] where Mālik quotes a *mursal* tradition on pre-emption on the authority of the successors Ibn Musayyib and Abū Salama b. ᶜAbd al-Raḥmān, and adds: "To the same effect is the *sunna* on which there is no disagreement amongst us." In order to show this, Mālik mentions that he heard that Ibn Musayyib and Sulaymān b. Yasār were asked whether there was a *sunna* (that is, a fixed rule) with regard to pre-emption, and both said 'yes, there is', and gave the legal rule in question. Schacht here intends to demonstrate that the *sunna* was established by the Medinese because the companions of the Prophet held an opinion that agreed with the doctrine in question and men did not disagree on it. He then, concludes that "the wording here and elsewhere implies that *sunna* for Mālik is not identical with the contents of traditions from the Prophet."[39]

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[36]Schacht, *Origins*, 58.

[37]Ibn al-Muqaffaᶜ, "Risāla f. al-Ṣahāba" in *Rasāʾil al-Bulaghāʾ*, ed. Muḥammad Kurd ᶜAlī (Cairo: 1913), 126.

[38]al-Azami uses the same instance to criticize Schacht's argumentation. See, *On Schacht's Origins*, 43.

[39]Schacht, *Origins*, 62.

Awzāᶜī, a prominent scholar of Syria, though he acknowledges the concept of the *sunna* of the Prophet, does not identify it with formal traditions. He contended that informal tradition without *isnād* and anonymous legal maxim were the way to show the existence of a past *sunna* going back to the Prophet. His idea of the 'living tradition' is based partly on actual custom, which in many cases, were projected back to the higher authority such as ᶜUmar b. ᶜAbdalᶜazīz, or idealized by himself, he even considered the stage of his immediate predecessors as the perpetual and agreeing practice. Therefore, the continuous practice of the Muslims is the significant element. Reference to the Prophet or to the first caliphs is optional, but not necessary for establishing it.[40] Awzāᶜī mentioned that "he who kills a foreign enemy (in a single combat) has the right to his spoils". According to Schacht, Awzāᶜī does not say that this maxim can be traced to the authority of the Prophet.

The Iraqians, in their view of *sunna*, no more think of it as based on traditions from the Prophet than do the Medinese. With reference to the Iraqians assertion, "we do this on account of the *sunna*". Schacht argues that they use *sunna* as an argument, even when they can show no relevant tradition.[41]

Abū Yūsuf, a member of the Iraqian school of law, distinguishes between what he has heard on the authority of the Prophet, the traditions (*āthār*), and the well-known and recognized *sunna*. The latter in Schacht's opinion is the doctrine of the school, the outcome of religious and systematic objections against the ancient lax practice.

For Abū Yūsuf, *sunna* was not merely related to the Prophet. He relates a tradition from ᶜAlī, according to which the Prophet as well as Abū Bakr used to award 40 lashes as a punishment for drinking wine, whereas ᶜUmar awarded 80 lashes. He

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[40]Ibid, 70.

[41]Ibid, 73.

then comments: "All this is *sunna*, and our companions are agreed that the punishment for drinking wine is 80 stripes."

Comparing the Medinese and Iraqians as regards the idea of the *sunna* of the Prophet, Schacht concludes:

> [T]he '*sunna* of the Prophet', as understood by the Iraqians, is not identical with, and not necessarily expressed by, traditions from the Prophet; it is simply the 'living tradition' of the school put under the aegis of the Prophet. This concept is shared by Awzāᶜī, but not by the Medinese. It cannot be regarded as originally common to all ancient schools of law, and as between the Syrians and the Iraqians, the evidence points definitely to Iraq as its original home. In any case, it was the Iraqians and not the Medinese to whom the concept of '*sunna* of the Prophet' was familiar before the time of Shāfiᶜī.[42]

It was Shāfiᶜī who originally determined that the *sunna* is established only by traditions going back to the Prophet, not by practice or consensus.[43] In so stating, he attacks the old ideas of *sunna*, 'practice' and 'living tradition'. He addressed his critique towards the Egyptian Medinese as follows:

> So you relate in this book (the *Muwaṭṭāʾ*) an authentic, well-attested tradition from the Prophet and two traditions from ᶜUmar, and then diverge from them all and say that judgement is not given according to them and that the practice is not so, without reporting a statement to the contrary from anyone I know of. Whose practice then have you in mind when you disagree on the strength of it with the sunna of the prophet--which alone, we think, ought to be sufficient to refute that practice-- and disagree not only with the *sunna* but with ᶜUmar also?.... [A]t the same time, you fall back on practice, but we have not discovered to this very day what you mean by practice. Nor do I think we ever shall.[44]

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[42]Ibid, 76.

[43]Schacht, *Introduction*, 10-49; "Law and Justice," in *The Cambridge History of Islam* 2 (Cambridge: Cambridge University Press, 1970, 539-55; "A Revaluation of Islamic Tradition," *Journal of the Royal Asiatic Society* 49 (1949): 43-54.

[44]Shāfiᶜī, *Kitāb Ikhtilāf Mālik wa al-Shāfiᶜī*, in *al-Umm* (Cairo: 1357 H), 68, as cited by Schacht, *Origins*, 78.

Juynboll, who admits much influenced by Schacht also comes to the same conclusion with the latter by stating that the time when the concept of *sunna* began to be exclusively identified with *sunnat al-Nabī* is to be set at some six or seven decades after the Prophet's death, that is towards the end of the first century of the Hijra.[45] In reaching this conclusion, Juynboll examines the chronology of the growth of traditions, and he describes the prophetic *sunna* with reference to the first caliphs. Only thirty nine of the prophetic sayings were transmitted through Abū Bakr in Mālik's *Muwaṭṭa'* with deficient *isnād* to Mālik. In Ṭayālisī's *Musnad*, only nine traditions are transmitted through Abū Bakr, seven of which are of the *tarhīb wa targhīb* genre and two are historical accounts. In Muslim's *Ṣahīh* , five traditions go back to Abū Bakr, and these can also be found in Ibn Ḥanbal in longer or shorter versions. This evidence implies that Abū Bakr in making decisions did not consider examples set by the Prophet or his followers but relied almost exclusively on his own judgement. Otherwise many more traditions traced back to him would have been found in the earliest collections.[46]

ᶜUmar, the second caliph, according to Juynboll, did not mention the *sunna* of the prophet as the main tools of solving problems on his death bed when he told his followers to resort in case of difficulties to the Qur'ān, the Muhājirūn, the Anṣār, the people of the desert and to the *ahl al-dhimma*.[47]

In Mālik's *Muwaṭṭā'* of all the 234 traditions in which ᶜUmar figures, only fifteen contain sayings or descriptions of actions of the Prophet with three more which

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[45]Juynboll, *Muslim Tradition*, 30.

[46]Ibid, 24.

[47]Ibn Saᶜd, *Kitāb al-Ṭabaqāt al-Kabīr*, 9 vols, iii i, ed. E. Sachau *et al.* ii, (Leiden: 1905-17), 243.

are mere repetitions.[48] This suggests that ᶜUmar was not in favor of the prophet's traditions being widespread.

As regards ᶜUmar's words mentioned above, it is safe to conclude that ᶜUmar would have to refer to the *sunna* of the Prophet in his statement if the concept of *sunna* had already become exclusively equated with the *sunna* of the Prophet.

ᶜUthmān's transmission of the traditions did not differ from that of two of his predecessors. There is a lack of legal traditions in those transmitted by him, though he was one of those companions whose personal advice was sought on legal issues.[49] Although the number of people who allegedly transmitted material from him is large, not one prophetic tradition-- legal or other-- on his authority is listed in the *Ṭabaqāt* of Ibn Saᶜd with the exception of the famous dictum *Man qāla ᶜalayya mā lam aqūl* etc.[50] ᶜUthmān also seems to have relied solely on his own judgement. In Mālik's *Muwaṭṭāʾ* only three of his transmission were concerned with prophetic traditions.

Having examined the first three caliphs, Juynboll concludes: "So far a pattern seems discernible. A major historical source depicts the first three as mainly relying on their own personal judgements, offering only very few instances when they allegedly resort to following an example set by the prophet."[51] He states further: "although the concept *sunnat al-Nabī* occasionally emerges in the earliest sources, in the vast majority

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[48]Juynboll, *Muslim Tradition*, 27

[49]Ibn Saᶜd, *Kitāb*, v ii 2, 99.

[50]Ibid, 100. Juynboll discusses this saying in chapter 3 of his *Muslim Tradition*, and offers an analysis and tentative dating of this saying (mid second century).

[51]Juynboll, *Muslim Tradition*, 28.

of cases we find merely *sunna*, with or without the definite article, while the contexts do not make clear to whom and/or to what region the *sunna* in question is ascribed."[52]

Juynbol here intends to convince the readers that the concept of *sunna* is not necessarily related to the Prophet, others also could create a *sunna*. ʿUmar b. ʿAbdalʿaziz who is described in history as a promotor of the prophetic *sunna*, did not neglect *sunnas* from other sources. It is evident from a saying attributed to him in Ibn ʿAbd al-Ḥakam's *Sīrat ʿUmar Ibn ʿAbdalʿazīz* : "*sanna rasūlullāh wa wulātu ʾlamri baʿdahu...*" "The Prophet and after him his successors in office, established *sunna*.". Since ʿUmar II was born in 60 A. H., it is safe to assume that his ideas concerning the *sunnat al-Nabi* in any case were not earlier than the year 80 A. H..[53]

The *Isnāds* System

Another argument Joseph Schacht brings to the support of his theory of the development of Islamic law relates to the *isnād*. According to him, "There is no reason to suppose that the regular practice of using *isnāds* is older than the beginning of the second century A. H."[54] He based his statement on Horovitz who pointed out that the *isnād* was already established in the generation of Zuhrī (d.123 A.H. or later), but to project its origin backwards into the last third of the first century A.H. at the latest or well before the year A.H. 75 is unwarranted, and also Caetani has shown that the *isnād* was not yet customary in the time of ʿAbdalmālik (65-86 A.H.).[55]

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[52]Ibid, 32.

[53]Ibid, 34.

[54]Schacht, *Origins*, 37.

[55]Ibid.

As Schacht denies the existence of the traditions from the Prophet in the first century of the Hijra, it is natural that he also denies the existence of *isnād* at that time. He suggests that interest of the *isnād* started from the civil war,

> ... the civil war which began with the killing of the Umayyad caliph Walīd b. Yazīd (A.H. 126), towards the end of the Umayyad dynasty, was a conventional date for the end of the good old time during which the *sunna* of the Prophet was still prevailing; as the usual date for the death of Ibn Sīrīn is A.H. 110, we must conclude that the attribution of this statement to him is spurious. In any case, there is no reason to suppose that the regular practice of using *isnāds* is older than the beginning of the second century A.H..[56]

Juynboll in line with Schacht, argues that according to Muslim scholarship, the *isnād* came definitely into use after the troubles ensuing from the murder of the caliph ᶜUthmān 35/656. But it is not likely. He shows that it is more likely that this word the civil war (*fitna*) is meant between ᶜAbdallāh b. al-Zubayr and the Umayyad caliphs in Damascus. He examines Ibn Sīrīn's use of that word and interprets that the latter used that term to describe an event which occurred during his own life--that is the civil war between ᶜAbdallāh b. al-Zubayr and the Umayyad caliphs-- rather than to an event which took place when he was still an infant.[57] Juynboll also takes Zuhrī's position as the first man who made consistent use of *isnāds*. Since the latter was born in 50 A. H., it seems more likely to consider "the *fitna* alluded to in the statement of Ibn Sīrīn as the one resulting from the conflict of Ibn al-Zubayr and the Umayyads."[58]

To make this opinion even stronger, Juynboll examines the birth of the institution of the *isnād*. He argues that the more appropriate date to put is in the late sixties or early seventies. This is so because the bulk number of forged *ḥadīth* were

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[56]Ibid, 36-37.

[57]Juynboll, *Muslim Tradition*, 18.

[58]Ibid, 19.

noticeable by the end of the first century. Therefore it is not safe to assume that the institution of the *isnād* is earlier than the above date since it would take so long for the first Muslim *isnād* critics to apply their criticism and that is not reasonable.[59]

In addition to that, Schacht is of the opinion that the *isnāds* were put together very carelessly.[60] He goes even further and says, "Any typical representative of the group whose doctrine was to be projected back on to an ancient authority could be chosen at random and put into the *isnād*. We find therefore a number of alternative names in otherwise identical *isnāds*."[61] He cites such alternative names which are particularly frequent in the generation preceding Mālik, as Nāfiᶜ and Sālim, Nāfiᶜ and ᶜAbdallāh Ibn Dīnār. Nāfiᶜ and Zuhrī, Yaḥyā Ibn Saᶜīd and ᶜAbdallāh b. ᶜUmar ᶜUmarī, Yaḥyā Ibn Saᶜīd and Rabīᶜa.[62] He also mentions the alternation between Muḥammad Ibn ᶜAmr Ibn Ḥazm and Abū Bakr (Ibn ᶜAmr) Ibn Ḥazm as an instance from the generation before that.[63]

To support his argument about the general uncertainty and arbitrary character of *isnāds*, Schacht cites two stories about a *mudabbar*[64] slave, each with a special *isnād*. One example with the *isnād* Mālik--Muḥammad Ibn ᶜAbd al-Raḥmān Ibn Saᶜd Ibn Zurāra: Ḥafṣa killed a *mudabbar* slave who had bewitched her.[65] Another instance with

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[59]Ibid.

[60]Schacht, *Origins*, 163.

[61]Ibid.

[62]Ibid, 164.

[63]Ibid.

[64]A slave to whom freedom has been promised on the master's death.

[65]Mālik Ibn Anas, *Muwaṭṭāʾ*, iv, version Yaḥyā Ibn Yaḥyā, with the commentary of Zurqānī, 4 vols (Cairo: 1310), 49.

the *isnād* Mālik-- Abū al-Rijāl Muḥammad Ibn ʿAbd al-Raḥmān (Ibn Jāriya)--his mother ʿAmra: ʿĀʾisha sold a *mudabbar* slave who had bewitched her.[66] Schacht argues that the two similar stories cannot be regarded as historical since they were put into circulation in the generation preceding Mālik on the fictitious authority of one Muḥammad b. ʿAbd al-Raḥmān whose name was used to refer to two different persons in the two versions and it is doubtful whether Mālik met either of them.[67]

Another example of how clumsily the *isnāds* were put together was given by Juynboll. He examined the *isnāds* of the *man kadhaba* dictum and found that at least five types of *isnāds* were ascribed to Abū Ḥanīfa. Based on these various types of *isnāds* he claims that they were most probably put together a considerable time after Abū Ḥanīfa's death. This is reasonable since according to Juynboll, Abū Ḥanīfa himself was reported for having ridiculed prophetic sayings.[68] He argues that the latter may be considered as hardly having been concerned with *ḥadīth*. The fact that there were some collections with his name, may be explained as the result of the efforts of later adherents to the Ḥanafite *madhhab*. Juynboll calls them the 'Abū Ḥanīfa *isnāds*' and claims that they cannot be found in other canonical collections of *ḥadīth*, thus "they were probably fabricated long after Abū Ḥanīfa's death in order to lend this *Imām* more prestige in the

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[66]Shaibānī, *Muwaṭṭaʾ*, version of Mālik *Muwaṭṭaʾ* (Lucknow: 1297), 359; see also Shāfiʿī, *Kitāb Ikhtilāf*, 93.

[67]Schacht, *Origins*, 164.

[68]There are several reports in which Abū Ḥanīfa emerges to ridicule prophetic sayings, especially those which have taken the form of legal maxims or slogans. Thus, when his attention was drawn to the saying: *Al-bayyiʿāni bi ʾl-khiyar mā lam yatafarraqa* he said: 'That is mere *majaz*.' And when the maxim *Afṭara al-ḥājim wa al-maḥjūm* was mentioned to him, he said: 'That is (merely) *sajʿ*. On another Prophetic saying was cited: *ʿAl-wuḍūʾ nisf al-īmān*', which prompted Abū Ḥanīfa to sneer: "So why do not you perfom this ablution twice in order that you perfect your faith.'" Juynboll, *Muslim tradition*, 121.

matter of *ḥadīth* transmission and also, perhaps, to bridge the gap somewhat between the *ahl al-raʾy* and the *ahl al-ḥadīth*."[69]

Schacht also contends that *isnāds* were gradually improved and projected back to higher authorities, so the most perfect and complete *isnāds* are the latest. He points to Abu Yūsuf who has collected in the Commentary the parallels in the classical and other collections. A comparison of his collection shows that the extent of the progressive completion, improvement, and backward growth of *isnāds* exist in his *Āthār*.[70] Schacht also points out that "Shāfiʿī does not remember having heard a certain tradition with a reliable *isnād* and doubts whether it is well authenticated. But the same tradition exists in Bukhārī and Muslim with a first-class *isnād*."[71]

Having discussed the foregoing survey of *man kadhaba* tradition in Ṭayālisī, Juynboll reach the same conclusion as Schacht's that the more elaborate or composite a tradition, the later it came into circulation. This also occurred for *isnāds*. Ṭayālisī once recorded Shuʿba who said: I *think* (Italic: Juynboll) that this tradition is a saying Abū Huraira received from the Prophet. But this tradition is listed *marfūʿ* in later collections, without any additional expression of doubt on the side of Shuʿba.[72] This dictum came into circulation in second half of the second century a. H., due to responsibility of the key figures in the *man kadhaba isnāds* such as Shuʿba b. al-Hajjāj (d.160 A. H.), active in Baṣra and Kūfa, Abū ʿAwāna al-Waḍḍāḥ (d. 176 A. H.) active in Wāsiṭ and Baṣra, and ʿAbd Allāh b. Lahīʿa (d. 174 A. H.), active in Egypt. In addition, the shift from

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[69]Ibid, 123.

[70]Schacht, *Origins*, 165.

[71]Shāfiʿī, *al-Risālah*, ed. Sheikh Aḥmad Muḥammad Shākir (Cairo, 1940), 315, as cited by Schacht in *Origins*, 166.

[72]Juynboll, *Muslim Tradition*, 128.

qāla, qawwala, and *taqawwala* to *kadhaba,* and *ʾftara* could be considered as an improvement made. More over, thirty-one *isnāds* which Ibn al-Jawzī lists but are not found in the nine older collections have to be considered as fabrications from the fourth century A. H. onward.[73]

In addition, Schacht states that we do not have any legal tradition from the Prophet which can positively be considered authentic.[74] He bases this statement on the so-called *e silentio* argument. Schacht assumes that the best way of proving that a tradition did not exist at certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed.[75] Juynboll supports this theory and adds that Muslim collectors frequently compile everything that earlier collectors have brought together. The fact that some traditions are absence in later compilers should be considered as "a relevant fact with significant implications for the chronology of that material or its provenance."[76] Juynboll then concludes that "the more famous the *ḥadīth,* the more significant is its absence where we

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[73]Ibid, 130.

[74]Schacht, *Origins,* 149. In this statement, he followed D. S. Margoliuth who says in his *Early Development of Islam* that the Prophet had left no precepts or religious decisions i.e., had left no *sunna* or *ḥadīth* outside the Qurʾān; that the *sunna* as practiced by the early Muslim Community after Muḥammad was not at all the *sunna* of the Prophet but was the pre-Islamic Arabian usage as it stood modified through the Qurʾān; and that the later generations, in the 2nd/8th century, in order to give authority and normativity to this usage, developed the concept of the *sunna* of the Prophet and forged the mechanism of the *ḥadīth* to realize this concept. H. Lammens, in his *Islam :Belief and institutions,* expresses the same view and declares tersely that the practice (*sunna*) must have preceded its formulation in the *ḥadīth* . See. Fazlur Rahman, *Islam* (Chicago: The University Chicago Press: 1966), 45.

[75]Ibid, 140.

[76]Juynboll, *Muslim Tradition,* 98.

would have expected it to be included and, consequently, the greater is the value of this non-occurrence being adduced as an *argumentum e silentio* ."[77]

Another of Schacht's theories is that new *isnāds* and additional authorities were created in order to confirm a tradition with self-reliant evidence.[78] For example, Mālik in his *Muwaṭṭa'* refers without *isnād* to the instructions on the *zakāt* tax which ᶜUmar gave in writing; the same instructions are projected back to the Prophet, with *isnāds* through ᶜUmar and other companions in Ibn Ḥanbal and the classical collections. [79]

Schacht also believes that all family *isnāds* [80] are spurious.[81] The existence of a family *isnād* not an indication of authenticity but only a device to make the tradition

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[77]Ibid.

[78]Schacht, *Origins*, 167

[79]Ibid.

[80]For instance, from father to son or grandson, from aunt to nephew, or from master to freedman.

[81]W. M. Watt says, while this may be so in the legal field, the use of such a device presupposes that there had been genuine instances of the 'family *isnād*' presumably in the historical field. He uses his personal experience to back up his idea, he personally, despite the fact of being a European living in 1980, knows of an event which happened about 200 years ago but is not recorded in any book or document, and bases his knowledge on a 'family *isnād*' . His maternal grandfather as a small boy was told by his great grandmother (called Mrs. Burns, but not relative) that she had once entertained to tea the poet Robert Burns in her house in Kilmarnock, and she added that at this period 'he was not much thought of'. He died in 1796. Watt, then, comments:

"that if this can happen in the non-oral culture of nineteenth- and twentieth-century Europe- and he has no reason to doubt the truth of the story - one might reasonably expect that in the predominantly oral culture of seventh-century Arabia families would preserve tolerably reliable reports of encounters between their ancestors and Muḥammad; and it appears that some reports were written down within about a century of the events". But Watt did not further elaborated why he distinguished between tradition as historical source and legal source. See his "The reliability of Ibn Isḥāq's Source" in *Early Islam* (Edinburgh: University Press, 1970), 20.

look secure.[82] He quotes Zurqānī, who examines the discrepancy in family *isnāds* of the various versions of a tradition in *Muwaṭṭaʾ*. i. 39, concerning Mālik's immediate authority ʿAmr Ibn Yaḥyā al-Māzinī; this tradition is an agreement between different doctrines.[83]

Juynboll in line with Schacht's argument that all the family *isnāds* are spurious examines the origin of the *man kadhaba* dictum in the oldest Iraqi collection, that of Ṭayālisī. A frequently occurring version reads: *Man qāla* (or *taqawwala*) *ʿalayya mā lam aqul falyatabawwaʾ*...etc., with the following *isnād* : Ṭayālisī - ʿAbd al-Raḥmān b. Abī al-Zinād - Abū al-Zinād - ʿĀmir b. Saʿd - ʿUthmān - Prophet. Juynboll focuses on Ibn Abī al-Zinād who is a controversial figure who all Iraqi critics stamped as a weak transmitter. The reason for this is that according to Ibn Saʿd he claimed that he had received from his father. That is why Mālik also expressed his suspicion of the material he allegedly received from his father who died in 130/748, while the "*man qāla ʿalayya mā lam aqul* " tradition was introduced after that date, not in Medina, his first town, but in Baghdad where he died at the age of 74. Juynboll also notices the fact that only Ṭayālisī and Ibn Ḥanbal who collect this tradition and the fact that it does not occur in later, sounder collections, as additional proof for its being deemed spurious.[84]

The common link theory is the most important theory which introduced by Schacht. He gives an illustration which describes a typical example of the phenomenon of the common transmitter occurring in *Ikhtilāf al-Ḥadīth*, 294, where a tradition has the following *isnāds* :

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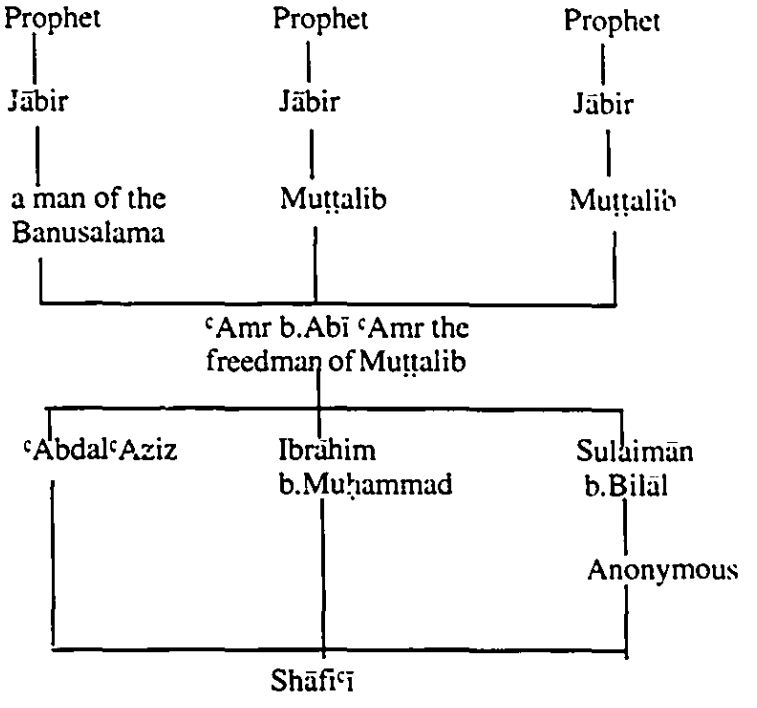
[82]Schacht, *Origins*, 170.

[83]Ibid, 171.

[84]Juynboll, *Muslim Tradition*, 126.



"ᶜAmr Ibn Abī ᶜAmr is the common link in these *isnāds* . He would hardly have hesitated between his own patron and an anonymous transmitter for his immediate authority."[85]

Juynboll recognizes that this theory is a brilliant one,[86] and gives further illustrations in its support :

> A tradition whose *isnāds* seem to have a common link is what one might call a legal maxim concerning the minimum amount of a dowry plus an *idrāj* . The prophet is reported to have said: *Lā mahra dūna ᶜashrati darāhim*, i.e., no dowry less than ten dirhams, which in two other versions is preceded by the *idrāj* : *La yankaḥū 'n-nisā'a illā 'l-akfā'u wa-lā yᶜzawwijūhunna illa 'l-awliyā'u*, i.e. women should be married only to husbands of equal social status and exclusively through the intervention of their guardians. Via the companion Jābir Ibn ᶜAbd Allāh and various Successor links, the *isnāds* converge in Mubashshir Ibn ᶜUbayd; the maxim *lā mahra*...on its own is then transmitted further by one ᶜAbd al-Quddūs Ibn al-Ḥajjāj and this maxim together with two versions of the

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[85]Schacht, *Origins*, 172.

[86]Juynboll, *Muslim Tradition*, 207.

idrāj (with irrelevant textual variants) first converge in the controversial Syrian transmitter Baqiyya b. al-Walīd to fan out again after him.[87]

Ibn al-Jawzī quotes the early *rijāl* critic Abū Aḥmad ᶜAbd Allāh Ibn ᶜAdī who said: "in addition to its *matns* different wordings and its *isnāds* heterogeneity this tradition is null and void, Mubashshir being its sole transmitter."[88] Juynboll comments: "Taken literally that means that Ibn ᶜAdī described Mubashshir, who is indeed a transmitter with a questionable reputation, as 'common link', as someone whom all the *isnāds* supporting this tradition have in common."[89] He therefore concludes "(a) that the common link as phenomenon must have struck medieval Muslim *ḥādīth* experts too; but (b) that they never took the issue any further but for hints at it in the case of an auspicious *ḥadīth* forger or allusions to certain key figures."[90]

To conclude, all hypotheses such as the role of Muḥammad not being related to the formation of legal matters, the Qurʾānic legislation describing norms and moral legislation only, the concept of *sunna* and prophetic *sunna*, the *e silentio* theory, the tendency of the *isnāds* to be projected back and the common link in a chain, are grounds on which Joseph Schacht reached the conclusion that Islamic law did not yet exist in the greater part of the first century, but it began to develop only in the first half of the second century of the Hijra. Of course, his arguments have not escaped criticism from other scholars whose views will be discussed in the second and third chapters.

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[87]Ibid, 214.

[88]Ibn al-Jawzī, *Kitāb al-Mawḍūᶜāt*, ii, ed. ᶜAbd al-Raḥmān Muḥammad ᶜUthmān, 3 vols (Medina: 1966-8), 263.

[89]Juynboll, *Muslim Tradition*, 216.

[90]Ibid.

CHAPTER TWO

THE CASE FOR THE EXISTENCE OF ISLAMIC LAW IN THE FIRST CENTURY OF THE HIJRA

The following discussion will be concerned with some scholars who maintain that Islamic law had been introduced by the Prophet and was continued by his successors since the very beginning of the first century of the Hijra. They are M. M. al-Azami,[1], David S. Powers[2], Noel J. Coulson[3], S. D. Goitein,[4] and Wael B. Hallaq.[5] This chapter will present their arguments in no specific order.

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[1]See M. M. al-Azami *On Schacht's origins of Muhammadan Jurisprudence* (Riyadh 1405/1985). He has also written another book entitled *Studies in Early Ḥadīth Literature* (Beirut: al-Maktab al-Islāmī, 1968), in which he argues in favour of the authenticity of *ḥadīth* in order to challenge Schacht's ideas on *ḥadīth* and *isnād*.

[2] He states that any attempt to investigate the origins of Islamic law should take the Qurʾān as its starting point. See David S. Powers, *Studies in Qurʾān and Ḥadīth: The Formation of the Islamic law of Inheritance* (Berkeley: University of California Press, 1986), xii.

[3]He argues that Muḥammad must have been faced during his rule at Medina with a variety of legal problems, particularly those which arose out of the terms of the Qurʾān itself. See Noel J. Coulson, *A history of Islamic law* (Edinburgh: Edinburgh University Press, 1964), 22.

[4]He claims that the idea of the sharīʿa was not the result of post-Qurʾānic developments, but was formulated by Muḥammad himself. See S. D. Goitein, *Studies in Islamic History & Institutions* (Leiden: E. J. Brill, 1968), 133.

[5]He argues that *fatwās* had played their role in Islamic history not only since the "ancient schools" era when the founders of *Madhāhib* were actively engaged in *iftāʾ*, but indeed far before it, namely during the Companion's time. See Wael B. Hallaq "From *fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law," in *Islamic Law and Society*, 1, 1 (1994) 29-65.

The Birth-Hour of Islamic Law

In an article entitled "The Birth Hour of Muslim Law,"[6] S. D. Goitein questions whether the Sharīʿa goes back to the founder of Islam himself or not, and if so, at what juncture of his activities did a tendency towards law become evident. In so doing, Goitein bases his arguments upon the Qurʾānic verses and the historical events during the early Medinan era.

Some writers believe that the Qurʾān not only contains little legal matter, but also the little it contains is entirely unsystematic and erratic. "It is evident," Anderson claims, "that Muḥammad himself made no attempt to work out any comprehensive legal system, a task for which he seems to have been singularly ill-suited; instead, he contented himself with what went little beyond 'ad hoc' amendments to the existing customary law".[7] This notion is even "aggravated" by Count Ostrorog who claims that "of the 6236 verses of the Qurʾān, no more than about five hundred, less than one-twelfth, could be considered as having legal import."[8]

However, according to Goitein, this is not true. Even if it is seen "from a purely arithmetical point of view," he explains, "legal matters occupy a far larger part of the Qurʾān than assumed by the aforesaid estimate". Moreover, if compared to that of the Pentateuch / Torah, the Qurʾān doesn't contain less legal material. The earliest parts of the Qurʾān i.e., the Meccan verses, are not devoid of legal matters, but are religious and

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

[7]J. N. D. Anderson, "Recent Developments in Sharīʿa," *Muslim World* 40, (1950), 245.

[8]Goitein, "Birth-Hour," 24.

moral commandments rather than pieces of formal legislation. However, more legal material is contained in the latter parts of the Qur'ān, i.e., the Medinan sūrahs.[9]

Goitein is of the opinion that while in Mecca Muḥammad acted merely as preacher and prophet, whereas in Medina the requirements of the ever-growing community forced him to give legal decisions from time to time. Soon after his arrival at Medina, he was able to organize the whole population of the town, whether Muslims or non-Muslims, into one political body, called the Ummah. To maintain this ummah's unity, he made a constitution consisting of forty-seven paragraphs. Thus, he prescribed some legal matters. Besides this, there are many treaties contracted by him with various Arab tribes. Moreover, Goitein believes that many legal questions must have been brought before the prophet and decided by him at the time. "But why then were so few of these legal decisions incorporated in the many surahs of the early Medinan period?." In answer to this question, Goitein says: "To my mind, this can only be that it occurred to Muḥammad only at a relatively late period that even strictly legal matters were not religiously irrelevant, but were part and parcel of the divine revelation and were included in the heavenly book."[10]

He further explains, "I believe that we have an exact account of this most fateful development in the prophet's career in a lengthy Qur'ānic passage namely Sūrah V (*al-Mā'idah*) 42-51. Since the revelation of these verses, the religion had become totalitarian, comprising all departments of life, including the hitherto neutral aspect of law." When discussing the contents of the above-mentioned verses, the *asbāb al-nuzūl* of these verses should be taken into account. Goitein strongly believes that repeated references to the Jewish rabbis and scholars in the verses can only fit a time when there

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[8]Ibid.

[10]Ibid, 26.

still remained a considerable number of Jews in Medina, i.e., before the end of the fifth year of the Hijra. Thus, the most suitable date for this part of *Sūrat al-Mā'idah* would be the fifth year of the Hijra, i.e., a date also suggested by several eminent Muslim authors such as Zuhrī, Wāqidī, and Ṭabarī. Henceforth, it can be said that the birth hour of Muslim law occurred at the same time as these verses were revealed.[11]

Although Goitein is convinced that Muslim law can be traced back as early as the fifth year of the Hijra, he raises several questions concerning the heavenly origin of the law and whether it came to Muḥammad from outside or was developed by him independently. In answer to such questions, he declares that the idea of Sharia was not the result of post-Qur'ānic developments, but was formulated by Muḥammad himself and it was Muḥammad himself who envisaged law as part of divine revelation.

The Role of *fatwā* in early Islam

Wael B. Hallaq questions the "established thesis" that Islamic law began only towards the end of the first century of Islam and that Muḥammad and the generation that followed him did not view themselves as promulgators of Islamic legal norms.[12] In so doing, Hallaq examines *fatwā* as his main argument to prove that Islamic law had existed since the early first century of Islam and that Muḥammad and the generation that followed him did view themselves as promulgators of Islamic legal norms. The *fatwās* issued by *muftīs* which were considered to be of frequent occurrence and relevance to the contemporary needs were later, transformed into *furū'* works through several processes Later on, 'these works', according to Hallaq, were expected to offer solution for all conceivable cases so that the jurisconsult might draw on the established doctrine

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[11]Ibid, 27.

[12]Hallaq, "From *fatwās* to *Furū'*," 31.

of his school. Furthermore, these collections included the most recent as well as the oldest cases of law that arose in the school. *Fatwās* provided a continuous source from which the law derived its ever-expanding body of material. Thus, they represent the oldest and most recent material that is relevant to the needs of the society as it had developed and changed by a certain point in time.[13]

Henceforth, it can be said that it was the *muftī* who was responsible for the development of the legal doctrine embodied in *furūᶜ* works and it was also the *muftī* who was the ultimate expert on law. This conclusion is also supported by several factors: First, the final goal of *uṣūl al-fiqh's* methodology was *ijtihād*, performed by the *mujtahid*, and it was the *muftī*, not the *qāḍī*, who was equated with the *mujtahid*. Second, in Islamic history the office of *iftāʾ* was largely independent of governmental authorities and it was considered to be immune from political corruption. Third, *fatwās* issued by *muftīs* have provided the primary source for the elaboration and expansion of *furūʾ* works. Fourth, the *fatwās* of a jurisconsult are universal, and applicable to all similar cases. Finally, the crucial role played by *fatwās* in the formation of substantive law is nowhere more evident than in the dialectical relationship between *fatwā* and *madhhab*, the established and authoritative legal doctrine of the school.[14]

Having concluded that *fatwās* were instrumental in the development of Islamic legal doctrine, Hallaq arises a question as to what point of time in Islamic history did *fatwā* begin to play this role? According to him, *fatwā* played its role in Islamic history not only since the "ancient schools" era when the founders of the *madhāhib* were actively engaged in *iftāʾ*, but indeed far before it, during the prophet's Companions' time. Hallaq refers to Mālik who authored *Risāla fī al-fatwā* which he sent to a certain

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[13]Ibid, 55.

[14]Ibid, 57.

Ibn Ghassān, and which was well known in later centuries. He also refers to the *Mudawwana* which is believed to be a collection of *fatwās* issued by Ibn al-Qāsim, either on the authority of Mālik or through his own *ijtihād*.[15]

In addition, Hallaq states that during the first Islamic century, legal activity appears to have revolved around the *fatwās*. The experts of such matters were essentially no other than the *muftīs*. Hallaq states that almost 130 of the prophet's companion are associated with *iftā'* and several of them are said to have been prolific in issuing *fatwās*. They are ʿUmar b. al-Khaṭṭāb, ʿAlī b. Abī Ṭālib, ʿAbd Allāh b. Mas'ūd, ʿĀ'isha, Zayd b. Thabit, ʿAbd Allāh b. ʿAbbās and ʿĀbd Allāh b. ʿUmar.[16]

That some of the companions were *muftīs* is, Hallaq believes, supported by Qur'ānic evidence which indicates that at a certain point in time following the Hijra, the prophet began to think of Islam as a religion that provides or is capable of providing, a set of laws similar to those established by Judaism and Christianity (Q. S. al-Mā'idah: 42-50). It seems that Hallaq agrees with Goitein's opinion that these verses represent a turning point in the career of the Prophet around 5 A. H., when Jewish tribes appear to have resorted to him for the settlement of their disputes. However, Hallaq goes further, by declaring that this turning point is also supported by other Qur'ānic evidence relating to *iftā'*. For instance, the term *yas'alūnaka* (they ask you), *yastaftūnaka* (they seek your opinion) or *aftinā* (give us your opinion) occur in the Qur'ān no less than 126 times, in both Meccan and Medinan sūras. Though none of the Meccan verses have legal content, a full dozen of the Medinan ones are of a legal character. Similarly, the nine verses containing *yastaftūnaka*., seven of these verses are Meccan and are devoid

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[15]Ibid, 62.

[16]Ibid, 63.

of legal content, while the remaining two are Medinese and contain legal subject matter.[17]

Thus, all the evidence gathered by Hallaq and Goitein forces us to reassess the argument that the Qurʾān came to play a role as a source of law only toward the end of the first century of the Hijra. The above - mentioned facts clearly indicate that Qurʾānic law was already taking roots during the Medinese phase of the Prophet's life in the early years of the first century of the Hijra.

The Practice of the Prophet

In order to determine whether or not the concept of "the practice of the prophet" did already exist, and to what extent it had any significance, M. M. Bravmann took into consideration the oath of office sworn by the new caliph after ʿUmar's death. He notices that ʿUthmān swore an obligation to follow nothing but "the practice of the Prophet." Curiously, in this oath the word *sīra* was used to represent the practice of the Prophet not the word *sunna*. Furthermore, ʿAlī also took the oath in which he agreed to follow the practice of the Prophet. And again, in this instance the term *sīra* was used, not the term *sunna*. [18]

Bravmann argues that the term *sīra* was basically used to express the practice of the Prophet, but that this term subsequently fell into disuse, because of the tendency to distinguish the practice of the Prophet from the practice of the two caliphs, Abū Bakr and ʿUmar. In this sense, the word *sunna* later on replaced *sīra* in a very clear and unambiguous way, to represent the practice of the Prophet. Bravmann also argues that

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[17]Ibid, 64-65.

[18]M. M. Bravmann, *The Spiritual Background of Early Islam: Studies in Ancient Arab Concept* (Leiden: E. J. Brill, 1972), 127.

the very specific term *sīrat Rasūlillāhi* which was used in ʿUthmān's oath of office for "the practice of the Prophet" makes it perfectly clear that what is meant by the expression "the practice of the Prophet" is the specific, personal practice of the Prophet himself and not the practice of the community. Hence, this also proves that the concept of "the practice of the Prophet" has existed since the dawn of Islam.[19]

In so arguing, Bravmann considers both terms *sīra* and *sunna* to be equivalent. He quotes a paragraph where *sīra* and *sunna* were used in the same phrase and argues that the use of these two equivalent terms in a single phrase is nothing but a stylistic device. *Sunnat Rasūlillāhi wa sīratuhū*, for example, means "The practice and the procedure of the Prophet", but not the practice (*sunna*) and the life history (*sīra*) of the Prophet.[20] He addresses his critique towards Schacht's idea of the *sunna* that will be discussed in the following chapter.

Qurʾānic legislation on Inheritance

Taking Qurʾānic legislation as an example, especially those in the field of family law and inheritance, David S. Powers remarks that Islamic law had, in fact, started in the very early days of the first century of the Hijra. He examines pronouncements on the subject of inheritance in order to show the development of such a law, and further divides them into three distinct stages.[21]

The first stage deals with the Meccan period (610-22). In this period there were at least six verses concerning various aspect of wills and testaments which were

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[19]Ibid, 129.

[20]Ibid, 130.

[21]David S. Powers, *Studies in Qurʾān and Ḥadīth: The Formation of the Islamic Law of Inheritance* (London: University of California Press, 1986), 10.

revealed to Muḥammad. Those are *al-Baqara*: 180-82, 240, and *al-Mā'idah*: 105-6. Q. S. 2: 180 which enjoin a person contemplating death to leave a bequest for parents and relatives; Q. 2: 182 encourages the reconciliation of parties who disagree about the provisions of a will; Q. S. 2: 240 which permits a testator to stipulate that his widow is entitled to a maximum of one year's maintenance, provided that she remains in her deceased husband's house; and the last, Q.5: 105-6 establishes that a last will and testament, to be valid, must be presented in the presence of two just witnesses. These six verses mirror a method of inheritance that allows every party a relative freedom to settle whom his heirs might be and how much they will inherit.[22]

Shortly after the emigration to Medina in 622 A. D., the second stage takes place. During that stage, Muḥammad received a second series of revelations establishing compulsory rules for the division of property; beginning by Q. 4: 8 which affirm the right of women to inherit, followed by Q. S. 4: 11-12 specifying the definite shares to which women are entitled. These verses put an end to the permissive and discretionary character of the stipulations in the Meccan period. From now on, it is God himself, not man, who determines whom the rightful heirs are, and how much they will receive. Q. 4: 11-12 were followed with two verses 13-14 which reinforce the divinity of the fractional shares.[23]

The third stage occurs after the conquest of Mecca in 630 A. D. when Muḥammad joined the relationship between the first and second series of revelations by issuing two statements limiting the scope of testamentary dispositions. In the first series

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[22]Ibid, 11.

[23]"These verses insist that these are the limits of God. Whoever obeys God and His messenger, He will cause him to enter gardens under which rivers flow , to dwell there in eternity. That is the great triumph. (4:13) But whoever disobeys God and His messenger and transgresses His limits, He will cause him to enter a fire, to dwell there in eternity. And he will be sorely punished. (4:14)". Ibid, 13.

of revelations called the bequest verses, the testator himself determines the type and quantity of the provisions to be made for parents, kindred, and wives, whereas in the second series, the fractional shares were established by God himself and are part of His plan for mankind. However, Q. 4: 11-12 award shares of the estate to the heirs "after any bequest he bequests". According to Powers, this problem was solved by "the *sunna* of the Prophet, which imposes two major restrictions upon the power of testation."[24]

The first restriction was reportedly given by the Prophet when he answered Saʿd b. Abī Waqqāṣ who asked if he might bequeath his entire estate. The Prophet replied, "a bequest may not exceed one-third of the estate." The second restriction is derived from an incident when Muḥammad is reported to have declared, on the occasion of his Farewell Pilgrimage (A. D. 632), "No bequest to an heir", i.e., any person who is awarded a fractional share of the estate. This is to stop a parent or a wife from receiving a bequest of up to one-third of the estate, in addition to the fractional share specified in Q.4:11-12.[25]

In sum, according to Powers, Islamic tradition teaches that at the time of his death, the Prophet had laid down the groundwork for what would become 'the science of the shares'. This work was completed over the course of the next thirty years by the companions such as ʿUmar, ʿAlī, Zayd b. Thābit, Ibn Masʿūd and Abū Mūsā.[26]

N. J. Coulson put forward the idea that legal activities had been practiced since the early days of the first century of Islam. He claims that since Muḥammad was naturally regarded as the ideal person to settle disputes, a variety of legal disputes must have been presented to his judgement. This is in accordance with the latter's position as

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[24]Ibid, 13.

[25]Ibid, 14.

[26]Ibid.

supreme judge, whose function was to interpret and elaborate upon the general prohibitions of the divine revelation.[27]

Similar to Powers, Coulson too takes the law of inheritance as an example of innovations introduced by the Qurʾān and clarified by Muḥammad. The first inheritance rule is that the Qurʾānic heirs should first be given their share and then the residue should go to the nearest *ʿaṣāba* relative. This rule constitutes a compromise between the new heirs named in the Qurʾān, and the old heirs of the customary law. Muḥammad also introduced the restriction of a testamentary bequest to one-third of the net assets. Finally, he also stated the rule "No bequest in favour of an heir" to constitute the principle of the inviolability of the proportionate claims of the legal heirs. These regulations, according to Coulson, "marked the beginning of the growth of a legal structure out of the ethical principles of the Qurʾān."[28] However, Coulson laments that "Muḥammad made no attempt to elaborate or to codify these innovations into a coherent code of law. The latter was satisfied to proffer ad hoc solutions as problems arose."[29]

After the death of Muḥammad, Medina remained the political and religious center of Muslim life, particularly during the reign of the first four caliphs. The latter are responsible for further implementing the Qurʾānic provisions and other legal matters, such as the foundation of the rudiments of a fiscal regime which was introduced by ʿUmar, when he instituted the *dīwān*, or pay-roll register, to facilitate the distribution of stipends. In addition, ʿUmar decided not to divide the lands won in conquest among the

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[27]N. J. Coulson, *History*, 22.

[28]Ibid.

[29]Ibid.

soldiers, to exacte a land-tax (*kharāj*) from the occupier of the land, and to inaugurate a new concept of land tenure.[30]

Also in the field of inheritance, Coulson cites ʿAlī's judgement in the case of the *Minbariyya*. This incident took place when ʿAlī was delivering a sermon in the mosque and was asked about the share of the wife when the deceased husband had also left two daughters, a father, and a mother. ʿAlī replied: "The wife's one-eight becomes one-ninth".[31] Similarly, Abū Bakr adjudged that when the deceased was survived only by his maternal and paternal grandmothers as in the case above, the whole estate should go to the maternal grandmother, as the Qurʾān does not specifically mention grandmothers. In such a case, the mother's mother, not the father's mother, could be regarded as the mother of the deceased. However, he later revised his decision and gave both grandmothers equal shares when ʿAbd al-Rahmān pointed out that the person from whom the present propositus, as a daughter's son, would never have inherited.[32]

Another illustration is the case of the *Ḥimāriyya* (the donkey case) in which ʿUmar considered the argument of litigants who appealed his previous decision, revised it, and then gave them their share. The reason Coulson cites those examples is to show that "the right of interpreting the Qurʾānic legislation was not the privilege of any special official body, but was and could have been exercised by anyone whose piety or social conscience dictated such a course."[33]

Coulson also claims that the caliphs had the power of positive legislation since the Qurʾān itself states: "Obey Allāh, his prophet and those in charge of your affairs".

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[30]Ibid, 23.

[31]Ibid, 24.

[32]Ibid.

[33]Ibid, 25.

He points out that the penalty for wine-drinking was fixed by Abū Bakr at forty lashes, and later as eighty lashes by ʿUmar and ʿAlī, the latter drawing a rough parallel with the offense of *qadhf* (false accusation of unchastity). Coulson then concludes that "during the Meccan period, the principles of Qurʾānic legislation were developed by the Prophet and his successors to the degree that was required by the practical problems confronting the contemporary Muslim community in Medina."[34]

After the four rightly-guided caliphs, Muʿāwiya came to power and established the Umayyad dynasty in Damascus. There Islamic law developed and acquired dimensions hitherto unknown in its former Medinan milieu. According to Coulson, since the basic policy of the Umayyads was to maintain the existing administrative structure of the provinces, they adopted many concepts and institutions of foreign origin. As examples, he cites the contract of *dhimma*, *ʿāmil al-sūq*, among others.[35]

The Umayyads also created the *qāḍī*, who was a special kind of judge. Among the notable judges of the era one can list *qāḍī* ʿIyaḍ, Khayr b. Nuʿaym, Ibn Ḥujayra, Tawba b. Namir. They were involved in legal activities, interpreting uncertainties in the Qurʿānic text, responding to questions on the precise legal implications of a general moral injunction in the Qurʾān, and other legal matters. Coulson stated that the Umayyad legal practice achieved a workable synthesis of the diverse influences at work in the Islamic empire. He added their task was to establish a practical system of legal administration, not a science of jurisprudence.[36] Earlier, he says: "[d]uring the Medinan, then, the principles of the Qurʾānic legislation were developed by the Prophet

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[34]Ibid, 26.

[35]Ibid, 28.

[36]Ibid, 30-35.

and his successors to the degree that was required by the practical problems confronting the Muslim community in Medina."[37]

Prophetic tradition in early Islam

The activities of the writing of the prophetic tradition during the early period of Islam provide further evidence that since the time of the Prophet, his activities, including his legal decisions had been recorded by his companions.[38] Although a polemic exists on whether or not Muḥammad allowed his companions to write down all his sayings, some evidence shows that his companions did write down his words. A case in point is Nabia Abbott's *Studies in Arabic Papyri* in which she examines some original *ḥadīth* papyri and came to the conclusion that the development of written traditions started very early on in Islam. In reaching her conclusion she divided the early Islamic era into four periods with the first taking place during the Prophet's lifetime. The second is the period after Muḥammad's death when there was a growth in the number of traditions widely circulated by the companions until the coming of the Umayyad period. The third is the Umayyad period where the role of Ibn Shihāb Muḥammad b. Muslim al-Zuhrī is stressed. The fourth period is characterized by formal and codified traditions appearing

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[37]Ibid, 26.

[38]The reliability of prophetic traditions as a source of Islamic law has been discussed by both non-Muslim and Muslim scholars, especially with respect to *isnāds*. Ignaz Goldziher considers most of the legal material ascribed to the Prophet to be, like the *ḥadīth*, of later origin. Moreover, he concludes that historians cannot be relied upon to authenticate historical data. As part of his study of law, Joseph Schacht examines the growth, the backward projection and later spread of *isnāds*, and concludes that some of those *isnāds* which the Muḥammadan scholars esteem most highly are the result of widespread fabrications. Thus, much of the work of the traditional approach is unacceptable as historical evidence; their whole technical criticism of traditions, which are mainly based on the criticism of *isnāds*, is irrelevant to the historical analysis. Schacht also states that family *isnāds* are all spurious and regards them as a device to give an appearance of authenticity.

in the canonical books. She claims that even the Arabs on the eve of Islam had been familiar with such sacred prose literature. Thus, it seems that Abbott tries to demonstrate that writing was not such a strange matter in early Islam as most western scholars believe. She then states that the collection of *ḥadīth* had begun in Muḥammad's lifetime by members of his family, clients, and close companions. "While several of his secretaries recorded his recitation of the Qurʿān, others attended to his state correspondence, and his administrators preserved the documents."[39]

The fact that ʿUmar and a few other companions rejected writing prophetic traditions should be interpreted as a caution against possible confusion between traditions and the Qurʾānic text, especially as the latter was as yet neither too familiar in the newly conquered provinces nor standardized in its homeland. Nonetheless, most of the companions who at first refrained from writing, either for personal reasons or out of deference to ʿUmar, eventually took up recording *ḥadīths* such as Ibn ʿAbbās and Abū Huraira. Moreover, some companions used the manuscript to aid their memory, and once they had memorized the content they destroyed the note. Others, however, kept their records and managed to save the manuscript of a teacher, as Saʿid b. Jubair had done for Ibn ʿUmar, or as the son of ʿAbd Allāh b. Masʿūd had saved the manuscript of his father.[40]

Among them there were also those who eagerly collected, recorded and transmitted the *ḥadīth* and *sunna* not only of Muḥammad but also of some of their fellow companions who were considerably close to Muḥammad. Foremost among

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[39]Nabia Abbott, "Ḥadīth Literature-II: Collection and Transmission of Ḥadīth" in *Arabic Literature to the End of the Umayyad Period*, ed. A. F. L. Beeston *et al* (Cambridge: University Press, 1983), 289.

[40]Nabia Abbott, *Studies in Arabic Literary Papyri*, Vol. 2, *Qurʾānic Commentary and Tradition* (Chicago: The University of Chicago Press, 1967), 10-11.

these were Anas b. Mālik, ʿAbd Allāh b. ʿAmr b. al-ʿĀṣ, Ibn ʿAbbās and Abū Huraira. Names such as ʿAmr Ibn Ḥazm al-Anṣārī, Abū Yasār Kaʿb b. ʿAmr, Masrūq b. al-Ajdaʿ, and the Yemenite ʿAmr b. Maymūn al-Awdi should also be mentioned here as great collectors of *ḥadīth* .[41]

The above-mentioned names clearly indicate that a number of companions had dealt with the collection and recording of the *ḥadīths* . Abbott intentionally mentions those names in order to correct the widely held notion that only a few prominent companions were engaged in serious literary activities.

It is true that during the first half of the first century, the writing of traditions was not widespread due to ʿUmar's instruction. However, Abbott argues that in the second half of the first century, when the dreaded ʿUmar was dead and the ʿUthmanic edition had been completed, the fear of confusion between *ḥadīths* and the Qurʾān was overcome and interest in both oral and written traditions deliberately increased.[42]

Such interest might have been the result of the demand for traditions for a variety of religious purposes, both private and public. As the society developed, the number of serious students and scholars increased in such a way that the religious sciences become a vital element in a society that regarded religious scholars, the *ʿUlamāʾ*, as heirs of the Prophets. Among the teachers who wrote down and taught traditions one may mention Abū Salamah ʿAbd Allāh b. ʿAbd al-Rahmān, one of the seven *fuqahāʾ*, who made school boys write down *ḥadīths* from his dictation. There were other teachers too such as Daḥḥāk b. Muzāḥim of Kūfah and ʿAṭāʾ b. Ribāḥ of Mecca. As a further example Abbott points out that the number and the popularity of prominent traditionists in early Islam, who had made a great contribution to the nascent religion and who had followers,

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[41]Ibid.

[42]Ibid, 12.

clearly indicates the existence of literary activities in the first half of the first century of the Hijra and its role in contemporary Muslim life. In addition, Abbott claims there was "Literally dozens of their contemporaries scattered across the vast empire who were also involved in the same activities but who had never received marked public attention though they hold no mean place in the Islamic biographical dictionaries of scholars."[43]

Muᶜāwiyah, the founder of the Umayyad dynasty, according to Abbott, also made a great contribution toward writing traditions, though he apparently did not write down *ḥadīths* during Muḥammad's lifetime. However, he is known to have begun to do so before he became caliph. He considered himself well informed in the *ḥadīth* and *sunna* of Muḥammad for the period during which he served the latter. Muᶜāwiyah also wrote to his governor of Kūfa, Mughīrah b. Shuᶜbah, to send him such traditions as he himself had heard directly from Muḥammad. Hence, Mughīrah dictated to his client and secretary Warrād what seems to have been four original traditions.[44]

Other Umayyad caliphs such as Marwān b. al-Ḥakam, and two of his sons, ᶜAbd al-ᶜAzīz and ᶜAbd al-Malik also took an active interest in *ḥadīth* -writing and religious literature. Even the latter is listed among the traditionists and had reached the rank --along with Nāfiᶜ the client of Ibn ᶜUmar, Shaᶜbī, and Abū Zinād-- with such leading Medinan scholars as ᶜUrwah ibn al-Zubair, Saᶜīd b. al-Musayyib and Qabīṣah b. Dhuᵓaib.[45]

ᶜUmar b. ᶜAbd al-ᶜAzīz should also be taken into account, especially in his capacity as one of the most famous of the Umayyad caliphs. His interest in the *ḥadīth* and *sunna* started early and remained a private matter until he became the governor of

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[43]Ibid, 17.

[44]Ibid, 19.

[45]Ibid, 20.

Mecca . Then he had the chance to become acquainted with scholars from the various provinces as they made the pilgrimage to Mecca. Most of the leading traditionists--including ᶜUrwah, Zuhrī and Abū Bakr b. Muḥammad b. ᶜAmr b. Ḥazm-- from whom ᶜUmar transmitted *ḥadīths*, did in turn transmit from him. Therefore, according to Abbott, the early Umayyads played a major role in the recording of *ḥadīth* and *sunna*.[46]

Abbott endowes al-Zuhrī[47] with a significant role in writing of and collecting traditions especially when the latter, after the death of ᶜUmar II, had new patrons, first Yazid II (101-5/ 70-24), who appointed him judge, and then Hishām (105-25/724-42) who entrusted him with the education of the princes, and consulted him on legal questions and historical events. According to Abbott,

> [I]t was neither ᶜAbd al-Mālik nor ᶜUmar II but Hishām who finally induced al-Zuhrī to commit the *ḥadīth* and *sunna* to writing, for the benefit of the young

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[46]Ibid, 25.

[47]al-Zuhrī was one of the Medinan scholars, who started with a study of the prophetic traditions and subsequently took interest in all aspects of the Prophet's life. Although Abbān Ibn ᶜUthmān and ᶜUrwa Ibn al-Zubair were the pioneers of the *Maghāzī* literature, it was al-Zuhrī who put the school of Medīna on solid foundations and set the lines of historical studies. In addition, a study of his work helps indicate whether the origins of the *Maghāzī* literature were in popular stories as some suggest, or in the more serious studies of traditionists and their followers. He studied with the foremost authorities on traditions, he had a good memory which helped him remember an enormous number of traditions, and he wrote all he heard to aid his memory. This indicates that al-Zuhrī was among the most learned men of his time, due to his ability to write. He also investigated the prophetic traditions in Medīna by attending gatherings, searching for accurate information, asking for his sources without limiting himself to scholars but also to the common people. As a result, al-Zuhrī covered the life of Muḥammad, beginning with the relevant pre-Islamic events, and proceeding to his prophetic career in Mecca and Medina. His work can be found primarily in Ibn Isḥāq, Wāqidī, Ṭabarī and Balādhurī.

Therefore it is safe to say that al-Zuhrī put historical studies on solid ground and led to the preservation of some early historical traditions that his student, Ibn Isḥāq, elaborated in his work, and thus making the latter's work highly appreciated. A. A. Duri, "Al-Zuhrī: A Study on the Beginning of History writing in Islam," in *SOAS Bulletin*, xix (1957), 1-3.

princes and several enterprising court secretaries who made copies for themselves, as well as for the enrichment of Hishām's library.[48]

Once convinced of the need to record the *ḥadīth* and *sunna*, al-Zuhrī, says Abbott, concentrated all his energies on the task and put writing and manuscripts to their fullest use. He adopted all methods included the *ʿarḍ* method of transmission, the *mukātabah* method, and the *ijāzah* method. Zuhrī and his pupils established these practices so thoroughly that they became known as *aṣḥāb al-kutub* (people with books).[49]

M. M. al-Azami also has a view like Abbott's regarding the activities of written tradition in early Islam. He argues that even in pre-Islamic Arabia reading and writing were very common. He points out several schools in Makkah, al-Ṭāif, Anbar, Hirah, Dumat al-Jandel, and Medina as places where boys and girls acquired an education. In addition, such books as the book of Daniel, books on wisdom and tables of genealogy are evidence of literary activities at that time.[50]

Azami declares that the Prophet himself was aware of the pivotal role of education. This was demonstrated by his instruction upon arrival at Medina to build a mosque and to designate part of the structure as a place for teaching his followers reading and writing. The Prophet also sent teachers outside of Medina to broaden the scope of Islamic teaching.[51]

Azami also mentions the fact that the Qurʾān contains several verses prescribing that every transaction on credit, however small its amount, should be written down and

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[48]Abbott, *Studies*, 33.

[49]Ibid, 35.

[50]M. M. al-Azami, *Studies in Early Ḥadīth Literature* (Beirut: al-Maktab al-Islāmī, 1968), 2.

[51]Ibid, 4.

attested by at least two witnesses. Another evidence brought by Azami is the long list of secretaries who wrote for the Prophet permanently or occasionally.

The literature of the early days of *Khilāfah* and the early Umayyad period can be divided into two categories, either non-religious or religious. Azami claims that the work on the biography of the Prophet was begun by companions, such as ᶜAbd Allāh b. ᶜAmr b. al-ᶜĀṣ who recorded many historical events,[52] and also by ᶜUrwah (d. 93 A.H.) who in his biography of the Prophet names his authority. It is also probable that he had obtained his information in writing. Azami points out several works such as the Memorandum on the servants of the Prophet, a book on the ambassadors of the Prophet to different rulers and chieftains with their negotiations, and also references to the collections of the Prophet's letters in a very early period. He then states that the authors of those subjects were born within the lifetime of the Prophet. This is to prove that Arabic literature had existed in the first century of the Hijra.[53]

From the above, it can be concluded that those scholars who argue that Islamic law had already existed since the early years of the first century of the Hijra base their arguments on the significant function of Qurʾānic legislation as the main source of Islamic law, on the role of the Prophet in his function as sole authority for interpreting and explaining of the Qurʾānic injunctions, on the role of the companions who had a similar function to the Prophet in guiding Islamic society towards their religion (*muftī*), and finally on the authenticity of the Prophetic traditions as the second source of Islamic law. Of course those arguments run counter to the arguments made by Schacht.

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[52]It is possible still to trace his work in the *aḥādīth* narrated by ᶜAmr b. Shuᶜaib (d. 118 A. H.) as he utilized his great grand father ᶜAbd Allāh b. ᶜAmr's book. Ibid, 7

[53]Ibid, 6.

Therefore, the following chapter will compare and analyze both arguments and will offer concluding observations on the problem at hand.

CHAPTER THREE

COMPARISON AND ANALYSIS

If we were to compare both sides discussed in previous chapters, we may concentrate on several issues which were based on the Qur'ānic legislation and the role of the Prophet, the concept of *sunna*, the authenticity of the prophetic traditions, and the *isnād* system. In the following pages, each argument will be discussed in the above order.

Qur'ānic Legislation and the role of the Prophet

It is true that Joseph Schacht, in reaching his own conclusion regarding the existence of Islamic law, did not take Qur'ānic legislation into account, since he considered the latter as a secondary source of Islamic law, "...any but the most perfunctory attention given to the Koranic norms, and any but the most elementary conclusions drawn from them, belong almost invariably to a secondary stage in the development of doctrine."[1] He mentions that the thief should have been punished not by having his hand cut off, as the Qur'ān prescribes, but by flogging. This indicates the difficulty of enforcing a penalty that was unknown to the ancient Arabs.[2] He further claims that there are several cases in which the early doctrine of Islamic law diverged from the clear and exact wording of the Qur'ān. He takes as an example the typical case

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[1]Schacht, *Introduction*, 18.

[2]Ibid.

of Islamic law on the restriction of legal proof to the evidence of witnesses and the denial of validity to written documents.[3]

It seems that Schacht tried to show that theory and practice in Islamic legal theory are not necessarily in accordance. As a result of his assumption, he totally rejects the idea that the Qur'ān played a significant role in formulating Islamic law in the early days of the first century of the Hijra. It is understandable now as to why he devotes himself only four pages to a discussion of Qur'ānic legislation in his *Origins*.

On this point, Azami blames Schacht's ignorance of Qur'ānic evidence related to the legal injunctions in formulating his thesis. Azami advances several verses from the Qur'ān regarding the nature of Islamic law and states as his conclusion:

> a. Law was an integral part of Islam. There was no aspect of behaviour that was not intended to be covered by the revealed law and this law was to be binding on all Muslim; none had authority to alter it.
> b. It was intended by Allāh that His Prophet's whole life, decisions, judgements, and commands should have the force of law. The authority of the Prophet does not rest on the acceptance of the community or on lawyers and scholars, but on the will of Allāh himself. [4]

Unfortunately, Azami did not allude to Schacht's claim that the early principle of Islamic law diverged from the explicit wording of the Qur'ān. Perhaps here Schacht might be correct from a historical point of view. However, he should not make generalization of his statement, since there are several other evidences which show that the Qur'ānic legislation was bound. Ẓafār Isḥāq Anṣārī claims that in so far as the Qur'ān is concerned, its position as a "binding source" of law seems to have been taken for granted from the very beginning. This is evident from the fact that the bulk of the questions jurists deal with was presupposed knowledge of the Qur'ānic provisions and

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[3]Ibid.

[4]Azami, *On Schacht's*, 15.

was stimulated by them.[5] He takes Abū Yūsuf's saying, as an example, that rulings about *halāl* and *ḥarām* should be based on categorical Qur'ānic verses without inference or explanation. The practice of the earlier *fuqahā'*, on the non-availability of the categorical Qur'ānic verses, says Abū Yūsuf, was to use moderate expressions such as "there is no harm in it" and "this is disapproved". Shaybānī, according to Anṣārī was not different from Abū Yūsuf. The former's statement indicated the absolute importance attached to the Qur'ān. Both of them held that the Qur'ān is the fundamental source of positive doctrines.[6] Anṣarī addresses his critique toward Schacht's contention that "the most perfunctory attention was given to the Koranic norms" as an exaggeration. In his own words:

> Schacht's view seems to be quite exaggerated in so far it attributes to the early generations of Muslims.... This creates a gap in the account of the development of Islamic law and renders it unrealistic. The fact, however, is that the Qur'ān continually remained the focal-point of Muslim legal and dogmatic speculation. Hence, it was natural that the relevance of the Qur'ānic legal verses to the problems which confronted the later generations was noticed, in general, by the later generations, rather than by the earlier ones; or that regarding a few questions which had been considered during the earlier period of Islamic law, it is the later generations who saw the relevance and significance of certain Qur'ānic verses. This, however, can hardly justify the assumption that in the early period only "the most perfunctory attention was given to the Koranic norms".[7]

By the same token Fitzgerald says that Islam "regards God as the sole source of law and absolutely denies the power of any human authority to legislate."[8] In other

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[5]Ẓafār Isḥāq Anṣārī, "The Early Development of Islamic Fiqh in Kūfah with Special reference to the works of Abū Yūsuf and Shaibānī." (Ph. D. diss., McGill University, 1966), 180.

[6]Ibid, 186.

[7]Ibid, 183-184.

[8]Fitzgerald, S.V. ,"The Alleged Debt of Islamic to Roman Law," *Law Quarterly Review* 67, (Jan 1951), 82.

words N. J. Coulson states that "the principle that God was the only Lawgiver and that His command was to have supreme control over all aspects of life was clearly established."[9]

Coulson does grant credit to Schacht's thesis and admits it is "irrefutable in its broad essentials", but he further questions:

> The Qur'ān itself posed problems which must have been of immediate concern to the Muslim community, and with which the Prophet himself, in his role of supreme political and legal authority in Medina, must have been forced to deal. When, therefore, the thesis of Schacht is systematically developed to the extent of holding that the evidence of legal tradition carries us back to about the year A. H. 100, [A. D. 719] only; and when the authenticity of practically every alleged ruling of the Prophet is denied, a void is assumed, or rather created, in the picture of the development of law in early Muslim society. From a practical standpoint, and taking the attendant historical circumstances into account, the notion of such a vacuum is difficult to accept."[10]

Coulson backs up his statement by showing the fact that the Islamic law of inheritance was the result of Qur'ānic legislation which needed immediate solution in the Muslim societies in early Islam. This is also supported by David S. Powers who says "that any discussion of positive law in Islam ought to begin with the Qur'ānic legislation in the field of family law, inheritance, or ritual."[11] He further charges that Schacht's study suffers from two weaknesses. Firstly, Schacht does not pay enough attention to the Qur'ānic legislation, especially rules of family law. Secondly, Schacht is blurring the distinction between jurisprudence and positive law. In addition, while he has tried to concentrate his analysis on the origin, he was not always careful to keep this distinction in mind. However, Schacht brings another evidence that the case of one-third restriction of bequest-- the most popular case in the Islamic law of inheritance-- originated in the

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[9]Coulson, *History*, 20.

[10]Ibid, 64-65.

[11]Powers, *Studies in Qur'an*, 7.

Umayyad era. The tradition of the Prophet which discusses this case, says Schacht, is the result of a backward projection. He further asserts "...if a restriction of legacies to one-third in the time of the Prophet was necessary, I should have expected it to be done in the Koran which refers repeatedly to legacies and...treats of the whole law of succession in detail."[12]

Coulson, in replying to Schacht's evidence, claims that the one-third restriction originated in the lifetime of the Prophet in order to solve a problem of Qurʾānic legislation. He further argues:

> Quite apart from the propriety of any speculation as to the proper content of what is, to the Muslim, divine revelation, Schacht's expectation in this regard is founded upon a complete misapprehension of the nature and scope of Qurʾānic laws. The notion that all the legal rules necessary for the Prophet's community in Medina are to be found in the Qurʾān is absurd in relation to succession as it is to any other sphere of law.[13]

Powers also has similar argument with Coulson. The former believes that "there is no reason to receive the dating of the one-third restriction in the Umayyad period."[14] He reasons that our analysis concerning the will of Saʿd b. Abī Waqqāṣ is certainly linked with the issue mentioned in the Qurʾān 4: 12b as a regulation of "the law of estate succession as it was understood during the lifetime of Muḥammad."[15]

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[12]Schacht, "Modernism and Traditionalism in a History of Islamic Law," *Middle Eastern Studies* 1 (1965), 393.

[13] Coulson, "Correspondence," *Middle Eastern Studies* 3 (1967), 199.

[14]David S. Powers, "The Will of Saʿad B. Abī Waqqāṣ: A Reassessment," *Studia Islamica* 58 (1983), 51.

[15]Ibid, 50.

While Schacht, Tyan, and Rahman[16] deny the role of the Prophet in formulating Islamic law, other scholars have a different point of view. Azami, for example, states that since the Qurʾān introduced new regulations which contradicted pre-Islamic life in Arabia, it was the duty of the Prophet to implement these rules and become a model for Qurʾānic injunctions such as those dealing with prayer, *zakāt*, *ḥajj*, usury, and other commercial transactions. The prophet must have explained them orally and showed them in practice which subsequently became the force of law under the authority of the *sunna*. Thus, according to Azami "the *sunna* came into existence simultaneously with the revelation of the Qurʾān and were part of the process of the creation of an Islamic system of jurisprudence."[17]

The first caliphs did not appoint *qāḍīs*, says Schacht, but even Muḥammad, according to Azami sent judges to several town and provinces. Some prominent figures such as ʿAbdullāh b. Masʿūd, Abū Mūsā al-Ashʿarī, ʿAlī b. Abī Ṭālib, ʿAmr b. al-ʿĀṣ, and Zaid b. Thābit were among the Prophet's judges. This tradition was continued by the caliphs in the first century of Islam. Thus, names such as ʿImrān b. Ḥusain, ʿAbdul

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[16]Rahman says: Now, the overall picture of the Prophet's biography--if we look behind the colouring supplied by the medieval legal mass-- has certainly no tendency to suggest the impression of the Prophet as pan-legist neatly regulating the fine details of human life from administration to those of ritual purity. The evidence, in fact, strongly suggests that the Prophet was primarily a moral reformer of mankind and that, apart from occasional decisions. For one thing it can be concluded *a priori*, who was, until his death, engaged in a grim moral and political struggle against the Meccans and the Arabs and in organising his community-state, could hardly have found time to lay down rules for the *minutiae* of life. See. Fazlur Rahman, *Islamic Methodology in History* (Karachi: 1965), 10-11.

[17]Azami, *On Schacht's*, 20.

Mālik b. Yaʿlā, Ḥasan al-Baṣrī, and Mūsā b. Anas were listed among the judges in the early Islam. [18]

Although Schacht negates the development of Islamic law during the first century of Islam, he admits the significant role of the *muftīs* in it. He says:

> [T]he doctrinal development of Islamic law owes much to the activity of the *muftīs* . Their *fatwās* were often collected in separate works, which are of considerable historical interest because they show us the most urgent problems which arose from the practice in a certain place and at certain time. As soon as a decision reached by a *muftī* on a new kind of problem had been recognized by the common opinion of the scholars as correct, it was incorporated in the handbooks of the schools.[19]

There seems to be a contradiction in Schacht's statement here. It should be noted that the activity of *iftāʾ* has been practiced since the early time of the Prophet and was continued by his companions. The evidence can be derived from the Qurʾān that contains several verses related to the *fatwā* . Hallaq rigorously holds this evidence to support his argument regarding the existence of Islamic law in early Islam and calls them a prototype *fatwā* in the Qurʾān. He argues that "during the first century of Islam, legal activities appear to have revolved around the *fatwā*, a phenomenon that makes sense in the context of a nascent religion which heavily depended on the advice of the experts who best knew the law." Hallaq charges that Schacht himself argues that the generation of Ibrāhīm al-Nakhaʿī were 'essentially *muftīs* '. Saʿīd b. al-Musayyib, ʿUrwa b. al-Zubayr, Qāsim b. Muḥammad, Sulaymān b. Yasār, Muslim b. Yasār, ʿUbayd

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[18]Ibid, 22.

[19]Schacht, *Introduction*, 74.

Allāh b. Masʿūd, Kaʿb b. al-Aswad, Muḥammad b. Sīrīn and Ḥasan al-Baṣrī are all described in later sources as *muftīs*.[20]

The concept of *sunna* of the Prophet

Schacht contends as regards the early concept of *sunna* that it was of the "living tradition" of the ancient schools of law and meant customary or "generally agreed practice" (*ʿamal, al-amr al-mujtamaʿ ʿalaih*). This idea was unrelated to the Prophet.[21] However, Bravmann does not accept this idea since according to him the meaning interpreted by Schacht belongs to the secondary stage. In doing so, Bravmann examined the use of the word sunna in the classical Arabic text in which the meaning of *sunna* consists of several basic meanings. *Sunna* may be identified with *faraḍa, afraḍa* which means well established, such as in al-Balāḍurī's *Ansab al-ashrāf*, III, 10-12) :...*inna ʿAbdallāh ibn ʿAmr ibn ʿUthmān abī qad sanna linisāʾihi ʿishrīna alfa dināri faʾin aʿaytanīhā wa ʾillā lam uzawwijka*.. Bravmann says *sanna* here is clearly synonymous with *faraḍa, afraḍa*, in its use with respect to the assigning of a certain amount of property as *mahr* 'nuptial gift'.[22]

Sanna, says Bravmann, may also in the specific use be followed by two objects in the accusative, the meaning of the phrase being: "to fix a certain obligatory payment at a certain amount (rate)". He quotes *Dīwān al-Farazdaq*, ed Boucher, p.199, 5): *Marwānu yaʿlamu idh yasunnu diyyātakum khamsīna anna diyyātakum lam takmul"*

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[20]Hallaq, "From *fatwās*," 32.

[21]Schacht, *Origins*, 58.

[22]Bravmann, *Spritual Background*, 152.

Marwan b. al-Ḥakam, in fixing the bloodwit to you (*yasunnu diyyātikum*) at fifty [camels, instead of a hundred], knew that the bloodwit due to you cannot be complete (since you are not free men). He also quotc Ibn Saᶜd, *Ṭabaqāt*, I, i; 54, I. 5 ff.)... *Wa ᶜAbd al-Muṭṭalib man* **sanna** *diyyata al-nafs miᵓat min al-ibil wa jarat fī Quraysīn wa al-ᶜArab miᵓat min al-ibil wa ᵓaqarrahā Rasūlullāh ᶜalā mā kānat ᶜalaih"...* "and ᶜAbd al-Muṭṭalib was the first to fix (*sanna*) the *diyyah* at hundred camels; and this amount then became the obligatory amount of the *diyyah* among Quraysites and the Arabs, and the Prophet confirmed this amount of *diyyah*,"[23] Based on these arguments, Bravmann considers that the concept *sunna* originally and basically cannot have referred to the anonymous custom of the community. His contention is that *sunna* means originally "the procedure that has been ordained, decreed, instituted, introduced into practice (by a certain person, or--less frequently-- by a group of definite persons)."[24]

Bravmann, in arguing with Schacht's idea related to the originality of the concept of *sunna*, examines the latter's arguments. Schacht according to Bravmann does not consider the term *sīra* as being equivalent with the term *sunna* . The former bases his argument on Shāfiᶜī's *Kitāb al-Umm* where Abū Yūsuf stated *balaghanā ᶜan Rasūlillāhi annahū qāla ...waqad balaghanā naḥwun min hādzā min al-athar wa al-sunna al maḥfūẓat al-maᶜrūfat....* Schacht comments on this as follows: "[Abū Yūsuf] distinguishes [here] between what he has heard on the authority of the Prophet, the tradition (*āthār*), and the well-known and recognized *sunna*. This last is simply the doctrine of the school, the outcome of religious and systematic objections against the ancient lax practice." However, Bravmann rejects this meaning and gives another

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[23]Ibid, 154.

[24]Ibid, 155.

meaning saying "The practice (of an early authority) that is well-preserved in memory and is well-known (notorious)". This means nothing but the typical *sunna* of the Prophet. The sentence above indicates that there are other traditions from the Prophet himself similar to the one mentioned at first (*balaghanā ᶜan Rasūlillāh annahū qāla...*).[25]

Bravmann points out to one another quote from Schacht quoting Abū Yūsuf concerning a punishment for drinking wine (chp.1). According to Bravmann, contrary to Schacht's interpretation, Abū Yūsuf himself does not make any use in this statement of the term *sunna*. The words *wakullun sunnatun*, are part of the tradition from ᶜAlī and do not belong to Abū Yūsuf's comment on it, which consists plainly of the following sentence: *Wa ʾaṣḥābunā...*" And our companions...".[26] Again when Schacht interprets Mālik's declaration, "We do not apply the *lex talionis* to [broken] fingers, until ᶜAbd al-ᶜAziz b. Muṭṭalib, a judge, applied it; since then, we have applied it" as "But the opinion of the Medinese does not become right because..." and Schacht considers them as a comment on Mālik statement by Shaybānī. But, Bravmann says, *falaysa yaᶜdilu ahl al-Madīnat fī ashyāʾi bimā ᶜamila bihī ᶜāmilun fī bilādihim* (read VII, p. 302, I. 27) is, in fact, part of Mālik own's statement himself and should be interpreted as follows: "For the Medinese hold nothing in as high esteem as a procedure practiced by a governor in their land."[27]

A basic theory of Schacht is that *sunna* means basically the continuos practice of the community, tantamount to a concept of a very specific nature which he assumes to occur in early Muslim legal source. Schacht states that Auzāᶜī considers an informal

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[25]Ibid, 131

[26]Ibid, 132,

[27]Ibid, 134.

tradition without *isnād*, concerning the life-story of the Prophet, sufficient to establish a past *sunna*, and an anonymous legal maxim sufficient to show the existence of a past *sunna* going back to the Prophet. For example, the Prophet says, "he who kills a foreign enemy (in single combat) has the right to his spoils." Auzāᶜī, according to Schacht, does not say that this is related on the authority of the Prophet...." Schacht also quotes Mālik who speaks of 'the *sunna* in the past' (*maḍat al-sunna*) on a point of doctrine on which there are no traditions, and then he interprets *sunna mādiyah* by "well-established precedent."[28]

However, Bravmann brings another evidence from Auzāᶜī (*K. al-Umm*, v. 7, 113) i.e. *maḍat al-sunna ᶜan rasūl Allāh (ṣᶜlm) man qatala ᶜiljā falahū salabuhū waᶜamilat bihī aᵓimmat al-Muslimīna baᶜdahū ilā al-yaum* . The phrase *maḍat sunna Rasūl Allāh*, says Bravmann implies by no means the idea of something "which happened in the past" and it is related to the *sunna* which was established by the Prophet.[29] It seems here that Bravmann, in dealing with the issue of the Prophetic *sunna*, successfully demonstrates that it originally belonged to the Prophet and was related to the personal practice of the Prophet, not the practice of the community as Schacht believes. He also, at the same time, extensively shows many weaknesses of the methodology and interpretation of Schacht when the latter discusses this matter.

The most advanced critique towards Schacht's arguments concerning the concept of *sunna* comes from Azami who claims that Schacht was influenced by D. S. Margoliuth. The latter, according to Azami used references dated from the first half of the first century. If Schacht, says Azami, receives these references as authentic, he

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[28]Schacht, *Introduction*, 30.

[29]Bravmann, *Spritual Background*, 141.

would also have to accept the fact that the term '*sunna* of the Prophet' was widely adjusted a hundred years before he asserted it was.[30]

Schacht cites Ibn Muqaffaᶜ who deemed that *sunna*, in his time, was based to a great extent on administrative regulations of the Umayyad government and that it had nothing to do with the Prophet or the first caliph as Shāfiᶜī believed. Azami examines Ibn Muqaffaᶜ's *Risālah fī al-Ṣaḥāba*, where the latter expresses his idea, contrary to what Schacht assumes, that the caliph has to act in accordance with the Qurʾān and the *sunna*, and that anything for which there is no precedent from the life time of the Prophet or the caliphs cannot be counted as *sunna*.[31]

When Schacht cites the case of pre-emption as a proof for the Medinese that *sunna* was the practice of the School, he, according to Azami, makes errors;

> 1. In the Arabic text clear reference is made to *sunna* and Schacht translates it as "a fixed rule," which is wholly unacceptable unless he means a fixed rule established by the Prophet.
>
> 2. He mentions the name of Sulaymān b. Yasār, who, however, has not been mentioned in the text referred to.[32]

Furthermore, Schacht claims "the wording here and elsewhere implies that *sunna* for Mālik is not identical with the contents of traditions from the Prophet." He cites five examples to support his idea. According to Azami, in order to do so, Schacht has had to distort the evidence, take arguments out of context, and suppress the fact. For example, Schacht charges Mālik of using tradition in order to justify his rational thinking, and not

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[30]Azami, *On Schacht's*, 40.

[31]Ibid, 42.

[32]Ibid, 44.

in the sense that it was merely related to the Prophet.[33] But, it is not true, says Azami, because the need to convince his opponents makes Mālik seek rational proof for his acceptance. Moreover, he states "What has been laid down in the established *sunna* is sufficient, yet, one may desire to understand the reason...., there is sufficient clarification of that."[34]

Schacht also quotes Ibn al-Qāsim (*Mudawwana* , v. 163) who says: '...So it is laid down in the tradition (*āthār*) and *sunnas* referring to the companions of the Prophet....'[35] Based on this he argues that the companions created their own independent *sunna* and that these could be appealed to in settlement of disputes. But, Azami accuses Schacht of misreading the Arabic text. Ibn al-Qāsim did not say so, he, rather, says " '*al-sunan fī aṣḥāb al-nabī* ' 'the *sunan* among the companions of the Prophet', or in other words the *sunna* which was followed by the Companions of the Prophet."[36]

Regarding the Iraqian school, Schacht states that the Iraqians, in their view of *sunna*, no more think it is necessary based on tradition from the Prophet. He quotes Tr. III, 148: "...This is *sunna* which is not in the Koran...," then he concludes that "the essential point is that the Iraqian use *sunna* as an argument, even when they can show no relevant tradition."[37] But, according to Azami, Schacht has mistranslated the passage. The Iraqian did not say: This is a *sunna* which is not in the Qurʾān. No one claims that

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[33]Schacht, *Origins*, 62.

[34]Imām Mālik, *Muwaṭṭaʾ*, vol. 1, 196; Azami, *On Schacht's*, 46.

[35]Schacht, *Origins*, 62.

[36]Azami, *On Schacht's*, 52.

[37]Schacht, *Origins*, 73.

the "Qur'ān is repository of the *sunna* ", but Schacht joins two sentences with "which", thus changing the meaning. The original text is: "...*wa hādhā sunna, ghair al-Qur'ān wa ghair al-shahāda*..." meaning '...this is a *sunna*, and is neither derived from the Qur'ān nor does it come under the category of bearing witness...[38]

Living tradition and *Sunna* of the Prophet

It is well-known that the Medinese constituted *ʿamal ahl al-Madina* which Schacht translates into the living tradition that conceived the expression such as *ʿamal* 'practice', *al-ʿamal al-mujtamaʿ ʿalaih* 'generally agreed practice', *al-amr ʿindanā* 'our practice'. Based upon these terms, Schacht arrives at his conclusions as follows; the practice existed first and traditions from the Prophet come later. He quotes Ibn Qāsim's words, "This tradition has come down to us, and if it were accompanied by a practice passed to those from whom we have taken it over by their own predecessors, it would be right to follow it..." [39] He further states, "the Medinese thus oppose 'practice' to traditions. This lip-service paid to tradition shows the influence they had gained in the time of Ibn Qāsim and it deserves to be noted that Ibn Qāsim relies on 'practice' although he might have simply referred to the tradition from the Prophet."[40]

But Azami rejects this conclusion by stating that on this point, Ibn Qāsim discussed that there are two kinds of prophetic tradition; the first type is accompanied by the practices of companions and successors and second type is not. In the case of a

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[38]Ibid, 54.

[39]Schacht, *Origins*, 63.

[40]Ibid.

conflict, the former should be adopted. Ibn Qāsim did not indicate what Schacht deems that the practice existed first and traditions of the prophet appeared later. Again, according to Azami, Schacht fundamentally fails to analyze properly the meaning of the text.[41] He is also inconsistent in using his source, when referring to the *Annales* of *Ṭabarī* to support his second conclusion of the Medinese that they preferred practice against traditions from the Prophet. Thus, whenever Muḥammad b. Abī Bakr gave a judgment against a tradition, his brother use to raise objections, and Muḥammad would reply, "What of the practice?" Schacht comments,"... meaning the generally agreed practice in Medina, which they regarded as more authoritative than a tradition."[42] According to Azami, this statement is found in a fourth-century work and is not quoted in second-century literature. Schacht himself charges the fourth-century work as spurious.[43] Anṣārī also charges Schacht with not being consistent with his source, since the latter uses later source of a late fifth century book i.e., Sarakhsi, *Mabṣūṭ*, when he cites an argument of Shaibānī in favour of a doctrine of his school.[44]

Schacht also concludes that "practice is explicitly identified with those traditions which the Medinese accept."[45] But, Azami claims that there were hundreds of traditions from the Prophet and the Companions accepted by Mālik without any reference to practice. When Schacht quotes Shāfiʿi reprimanding the Medinese for not following Ibn

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[41]Azami, *On Schacht's*, 58.

[42]Schacht, *Origins*, 64.

[43]Azami, *On Schacht's*, 59.

[44]Ẓafār Isḥāq Anṣārī, "The Authenticity of traditions: A critique of Joseph Schacht's argument *e silentio*," *Hamdard Islamicus* (1984), 54.

[45]Schacht, *Origins*, 66.

ᶜUmar's opinion, Mālik, says Azami, explicitly described examples of this in his *Muwaṭṭaʾ*. The latter disagreed with Ibn ᶜUmar's opinion that if a man prayed behind an *imām* , he should not recite the Qurʾān, and stated that when the *imām* does not recite loudly, the *maʾmūm* should recite the Qurʾān to himself. In another example: Mālik recorded that ᶜUmar prostrated himself after reciting *Sūrat al-Najm*, but Mālik disagrees with this practice.[46]

Schacht's fourth statement is that practice was falsely ascribed to early authorities "to justify doctrines which reflected the current practice" [47] But, according to Azami, this theory does not suit Mālik, since he recorded the practice of Medinese authorities and then differed from it, and also recorded their opinions and objects to them.[48] Schacht further claims that when Mālik records the opinions of his immediate teachers, such as ᶜUmar, Ibn ᶜUmar, Ibn al-Musayyab, and ᶜUrwah, these early authorities cannot be taken as genuine, but are only a device used "in order to justify doctrines which reflected the current practice or which were meant to change it...these efforts were sometimes successful in bringing about a change...but often not."[49] Theoretically, this theory is probably acceptable if the Medinese always imitated the early authorities, but Azami shows that Mālik sometimes agreed and disagreed with the authorities he quoted. The former then raises a question hyphotetically as to if he (Mālik) were falsely ascribing doctrines to these authorities to bring about changes in the doctrines of the school, he would not then contradict what he had himself just fabricated. In fact, Mālik

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[46]Azami, *On Schacht's*, 62.

[47]Schacht, *Origins*, 66.

[48]Azami, *On Schacht's*, 62.

[49]Schacht, *Origins*, 66.

himself reversed his opinion invariably as, for instance, concerning *al-masḥ ʿalā al-khuffain*.[50]

Azami also claims that Schacht's conclusion concerning the "living tradition" of the Syrian school has no basis and that his statements are based on assumptions rather than on precise analysis of Auzāʿī's writing. For example, Schacht claims that Auzāʿī is "inclined to project the whole 'living tradition', the continuous practice of the Muslims, as he finds it, back to the Prophet and to give it the Prophet's authority, whether he can adduce a precedent established by the Prophet or not." Schacht also claims that Auzāʿī is of the opinion that continuous practice is the decisive element and reference to the Prophet is optional.[51] But after having examined the treatise Schacht refers to, that comprises 50 cases, Azami claims that only 15 of the 50 cases does Auzāʿī refer to the continuous practice of the Muslims, and only nine of these are related to the Prophet. He says that "Auzāʿī also was very precise in referring to his authorities to the best of his knowledge. Sometimes he refers to the Prophet, sometimes to the early caliphs, sometimes to the practice of the Muslims, and in almost a third of the cases he simply gives his own opinion."[52]

The attitude of the ancient School of law to the *sunna* of the Prophet

Schacht says about the attitude of the Medinese Schools, and the ancient schools of law in general, that they had already used tradition from the Prophet as the basis of

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[50]Azami, *On Schacht's*, 63.

[51]Schacht, *Origins*, 70-73.

[52]Azami, *On Schacht's*, 65.

many decisions, but had *often* neglected them in favour of the reported practices or opinions of his companions, not to mention their own established practice.[53] He specifically mentions that "Mālik enjoins that the tradition be followed...[He] harmonizes an old-established tradition from the Caliph Abū Bakr with historical tradition from the Prophet. and claims that Mālik is far behind Shāfiʿī in accepting traditions from the Prophet."[54]

Azami, in dealing with this argument, underlines the word many and often, and examines a number of traditions in the *Muwaṭṭaʾ* described by Schacht and claims that Mālik accepted 819 of the traditions from the Prophet and rejected only three. Of the 613 traditions from companions he rejected ten. Therefore, according to Azami, it is difficult to see how three rejections out of 322 traditions from the Prophet can be the justification for the affirmation that they were "often neglected". On the contrary, he says, it seems clear that "Mālik was firm in his acceptance of the overriding authority of traditions from the Prophet."[55]

Schacht also concludes that the Medinese give preference to traditions from companions over traditions from the Prophet. This attitude, which is reflected in an anecdote on Zuhrī and Ṣāliḥ b. Kaisān in Ibn Saʿd... is, of course, unacceptable to Shāfiʿī.[56] He brings several means to prove this conclusion which Azami found almost baseless. Among those, for example, Schacht quotes Rabīʿ who says: "Our doctrine is to authenticate only those traditions that are agreed upon by the People of Medina, to

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[53]Schacht, *Origins*, 13.

[54]Ibid, 22-23.

[55]Azami, *On Schacht's*, 80.

[56]Schacht, *Origins*, 24.

the exclusion of other places."[57] This statement, according to Azami, does not logically lead to Schacht's conclusion. But this means that they had doubts about traditions related by those other than the Medinese and challenge their authenticity, not the authority. Moreover, Azami claims that Rabīᶜ was not Medinese by birth nor did he follow the Medinese School. In fact, he is a follower of Shāfiᶜī. Thus, "we can hardly accept him as the spokesman for the Medinese."[58]

The same phenomenon emerges when Schacht states that both Iraqians and Syrians share the similar attitudes with the Medinese to legal tradition from the Prophet. Azami charges Schacht for using Shāfiᶜī's words not on the writings of the parties concerned. Moreover, Schacht takes an example which according to Azami shows

> [A] perfect example of the former's arbitrary, self-contradictory use of his source material. The reference is to Shāfiᶜī quoting Abū Ḥanīfa's claim that he never differs from any of the Companions of the Prophet, nor does he violate analogy. But Shāfiᶜī points out that this is not so, since Abū Ḥanīfa in a particular case opposed the ruling of ᶜUmar. Shāfiᶜī even accuses the Iraqians of violating analogy. Nowhere is there any indication that traditions from the Companions are preferred over those from the Prophet--the entire discussion centers on the Companions themselves. Therefore, Schacht's reference does not help in this regard.[59]

Auzāᶜī, Schacht says, is "the only representative of the Syrians on whom we have authentic information in Tr. IX and in Ṭabarī, and his attitude to traditions is essentially the same as that of the Medinese and the Iraqians."[60] To support his case, Schacht says:

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[57]Ibid, 23.

[58]Azami, *On Schacht's*, 81.

[59]Ibid, 87.

[60]Schacht, *Origins*, 34.

> Auzāᶜī states, quoting Koran xxxiii. 21, that "the Prophet is a good example" (Tr. IX. 23), and that 'the Prophet deserves most to be followed and to have his *sunna* observed (#50), but in order to establish the practice of the Prophet he refers to "what happened at the time of the Prophet and afterwards" (#26 and elsewhere), he refers to Ibn ᶜUmar beside the Prophet (#31), and to Abū Bakr, ᶜUmar, and the Umaiyad Caliph ᶜUmar b. ᶜAbdalᶜazīz by themselves.[61]

However, Azami refers to Auzāᶜī's treatise to refute Schacht's idea that Syrians prefer tradition from the Companions rather than that the Prophet. In his treatise, Auzaᶜi cited actions of the Prophet that were followed by the Muslims, 10 times; actions of the Muslim and their *Imāms*, six times; Abū Bakr twice and ᶜUmar, ᶜAlī b. Abī Ṭalib, and ᶜUmar b. ᶜAbdalᶜazīz once. Thus, Azami says, we find 12 references to the Prophet alone and 22 references to the Prophet's actions in total, as against 11 references to others. Therefore, it is safe to conclude that "Auzāᶜī's attitude to the authority of the *sunna* of the Prophet is the same as that of the rest of the scholars. He conforms with the divine order: obey Allāh and obey the Messenger."[62]

The growth of legal tradition

Another ground on which both parties reach divergent conclusions on the existence of Islamic law in the first century of the Hijra is concerning the growth of legal tradition. Schacht concedes that the *ḥadīth* literature was fabricated by scholars in the second and third centuries who sought to justify their own views by tracing origins back to the Prophet. He says: "generally speaking, the living tradition of the ancient schools of law, based to a great extent on individual reasoning, came first, that in the second

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[61]Ibid.

[62]Azami, *On Schacht's*, 91.

stage it was put under the aegis of Companions, that traditions from the prophet himself, put into circulation by traditionist towards the middle of the second century A. H."[63] He also claims that the bulk of legal traditions from the Prophet known to Mālik originated in the generation preceding him, that is in the second quarter of the second century A. H.. Thus, he concludes "we shall not meet any legal tradition from the Prophet which can be considered authentic." [64]

It has been mentioned in chapter one that Schacht's conclusion is based on the *e silentio* argument, which assumes that if one scholar at any given time was ignorant of a particular *ḥadīth* and failed to mention it or, rather, that if it was not mentioned by later scholars that earlier scholars used that particular *ḥadīth* , then the *ḥadīth* did not exist at that time. If the *ḥadīth* is first found with incomplete *isnād* and later, with complete *isnād* , then the *isnād* has been fabricated.

Azami found that Schacht contradicted himself in this theory, since in an earlier chapter of his *Origins* argues that two generations before Shāfiʿī, reference to the *aḥādīth* of the Prophet were the exception,[65] and that all the ancient schools of law offered resistance to the reports of the Prophet.[66] Therefore, Schacht's argument that a tradition could not have existed if it was not used in a legal argument is untenable, because those who opposed the traditions would have been unlikely to have utilized them.[67]

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[63]Schacht, *Origins*, 138

[64]Ibid, 149.

[65]Ibid, 3.

[66]Ibid, 57.

[67]Azami, *On Schacht's*, 118.

This *e silentio* argument is also criticized by Ẓafār Isḥāq Anṣārī by using the method upside down, that is, by examining the traditions found in early works that are not found in later works. "This would mean," Anṣārī notes, "working on the reverse of Schacht's assumption." [68] To prove his argument, Anṣārī employed this method on four books: the *Muwaṭṭaʾ* of Mālik and of Shaibānī, and the *Āthār* of Abū Yūsuf and of Shaibānī, by probing the traditions that discuss the same issues. As a result, a large number of traditions found in the *Muwaṭṭaʾ* of Mālik are not found in the *Muwaṭṭaʾ* of Shaibānī. Anṣārī stresses the fact that the *Muwaṭṭaʾ* of Shaibānī appeared later then the *Muwaṭṭaʾ* of Mālik, and the *Āthār* of Shaibānī appeared later than the *Āthār* of Abū Yūsuf. Azami is also critical of this theory, he says:

> In a *reductio ad absurdum*, this argument would mean that if one writer in the Middle East failed to mention London as one of the major cities in the world, then all other writer who mentioned it later would be guilty of collusion in creating a fictional city. Even allowing for the fact that Schacht did not have available to him many important source books, he quotes from those that were available in a way which sometimes appears to accept and reject authorities arbitrarily and to ignore certain political and geographical realities.[69]

Extending Anṣārī's examples, Azami discovers many examples that refute Schacht's theory. Among those are the sections on timing of prayers in Malik's *Muwaṭṭaʾ* which contains all 30 *aḥādīth*; only three of these are mentioned in Shaibānī's *Muwaṭṭaʾ*. The section on *liʿān* in Shaibānī's *Muwaṭṭaʾ* (p. 262) omits several *aḥādīth* found in the corresponding section in Mālik's *Muwaṭṭaʾ* (p. 566 ff). Similarly, when he compares the *Āthār* of Abū Yūsuf and the *Āthār* of Shaibānī, a *ḥadīth* from Ibn Masʿūd on *muḍārabah* in *Āthār* Abū Yūsuf, is not found in the *Āthār* of Shaibānī. A

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[68] Anṣārī, "Authenticity," 54.

[69] Azami, *On Schacht's*, 116.

ḥadīth from ʿUmar occurring in the section on divorce and *ʿiddah* in the *Āthar* of Abū Yūsuf, is not found in the *Āthār* of Shaibānī.[70]

These omissions, according to Azami, are sufficient to indicate that scholars did not necessarily quote all the *aḥādīth* familiar to them, and there is no reason to suppose that they were ignorant of the *aḥādīth* omitted. It is natural for scholars to mention more *aḥādīth* that support their argument than those against them.[71]

Schacht is also inconsistent in discussing the growth of legal tradition from the Prophet, because instead of restricting himself to legal matters, he has filled the chapter with ritual *aḥādīth* . For example, from 47 traditions which he claims from the Prophet, in fact, some, Azami says, do not come from the Prophet, and the great majority of *aḥādīth* are not legal by his definition, and only one quarter of the material is relevant to the heading of the chapter.[72] He, then, concludes:

> Careful scrutiny of his examples and repeated reference to the original source material, however, reveals inconsistencies both within the theory itself and in the use of source material, unwarranted assumptions and unscientific method of research, mistakes of fact, ignorance of the political and geographical realities of the time, and misinterpretation of the meaning of the texts quoted, and misunderstanding of the method of quotation of early scholars.[73]

Schacht's examples have been examined by Azami in order to demonstrate the errors. Some of them will be presented here. Schacht takes a difference of opinion between Abū Ḥanīfa and Mālik about compensation for various injuries as the case to

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[70]For further examples see Ibid, 119-120.

[71]Ibid, 121.

[72]Ibid, 118.

[73]Ibid, 116.

prove his *e silentio* argument which is according to him made safe by Tr. VIII, 11, where Shaibānī says: "...unless the Medinese can produce a tradition in support of their doctrine, but they have none, or they would have produced it."[74] Schacht comments further: "We may safely assume that legal tradition with which we are concerned were quoted as arguments by those whose doctrine they were intended to support, as soon as they were put into circulation,"[75] but Azami claims that the above-discussion has nothing to do with a *ḥadīth* from the Prophet nor any other authority, rather focus on *fatwā* of Abū Ḥanīfa about compensation for certain kinds of injuries to slaves. Shaibānī, in this case, just wanted to know why the Medinese agree with Abū Ḥanīfa's decision in four types [cases] of injury, but in other cases they [the Medinese] said the compensation would be as much as his value has been declined. If they had *āthār* to this effect, the Iraqians would follow them in their discrimination.[76] Therefore, Schacht fails to show the validity of his argument.

Schacht also points to "tradition Originating between Auzāʿī and Mālik" (see above, p. 17) and impiies that Abū Yūsuf does not know it to be a *ḥadīth* from the Prophet, otherwise he would have mentioned. This *ḥadīth* at first emerged in the *Muwaṭṭaʾ* of Mālik and additional authorities were mentioned in later sources. He further states: "Where as this calls for caution in the use of the argument *e silentio* it

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[74]Schacht, *Origins*, 140.

[75]Ibid, 141.

[76]Azami, *On Schacht's*, 124. According to Shaibānī the Medinese have no tradtion in this regard to make differentiation in compensation. Had they some tratidions we would have learned them from them. Therefore, if they have nothing of this sort, they must be fair in treatment. Therefore, the right decision would be what Abū Ḥanīfa has decided (*al-Umm*. vol. vii, 288)

also shows that the tradition was not widely known in the time of Mālik."[77] However, Azami mentions the saying of Auzāᶜī : "*maḍat al-sunnat ᶜan rasūl Allāh man qatala ᶜiljā faᶜalaih salabuhu*" meaning the *sunna* which has been executed by the Prophet is that whoever kills (in the battlefield) an infidel, his spoils belong to the killer. This practice was established by the Prophet. We cannot say whether Abū Yūsuf knew it or not. He most probably did know it since the ḥadīth was recorded by Ibn Isḥāq whose works was well known to him who quoted from it time to time.[78] This is also to prove that this *ḥadīth* was recorded before Mālik--Ibn Isḥāq (80-115 A. H.) was younger than Mālik (91-179 A.H.)--, and recorded by Auzāᶜī (88-158 A. H.) who was older than Mālik. Azami further comments on Schacht: "When Schacht says that it appeared for the first time in *Muwaṭṭa'*, he implies that he has consulted a number of books prior to Mālik and all lacked this particular *ḥadīth* . But he does not give references."[79] This is also to prove that Schacht theory of fabrication of *aḥādīth* can be revoked by reference to other sources that give indication that earlier scholars were abreast of the *aḥādīth* at issue.[80]

The Authenticity of the *isnād*

The *isnād* system is another ground which leads Schacht to reach his conclusion regarding the existence of Islamic law in the first century. Whereas he believes that the using of *isnād* is in the beginning of the second century A. H., Azami deems that the

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[77]Schacht, *Origins*, 142.

[78]Azami, *On Schacht's*, 135-6.

[79]Ibid.

[80]Ibid, 122. Azami examines all Schacht's examples in order to prove their invalidities. Ibid, 116 - 153.

isnād system was born during the lifetime of the Prophet and had developed into a proper science by the end of the first century A. H.. The former bases his argument on the statement of Ibn Sīrīn (d. 110 A. H.) that the demand for the interest in *isnāds* started from the civil war (*fitna*). He remarks that civil war had begun by the time of the killing of the Umayyad Caliph Walīd b. Yazīd [126 A. H.].[81] However, Azami claims that Schacht had arbitrarily interpreted that word (*fitna*). Such a killing has never been a "conventional date" in Islamic history and was never recognized as the end of the 'good old time'. Besides, there were many *fitnas* before this date, and the biggest *fitna* of all was the civil war between ʿAlī and Muʿāwiyah. Even the killing of ʿUthmān before this time can be included as a *fitna* . Therefore, says Azami, "it is difficult to see any justification for assuming that the *fitna* referred to is the civil war that arose after the killing of Walīd b. Yazīd."[82]

It is worthwhile here to note that only on this point Juynboll is critical towards Schacht's argument. He rejects Schacht's contention regarding the word *fitna* as a statement referring to the events following the death of the Umayyad Caliph, Walīd b. Yazīd, in 126/ 744. After an extensive examination of the use of this word in the early source, he concludes that Ibn Sīrīn "was most probably speaking about Ibn al-Zubayr's revolt" (64-71).[83]

Azami examines Schacht's examples when the latter claims that the *isnāds* were put together very carelessly (chap. 1. 23). Since Schacht does not quote any *ḥadīth* from Nāfiʿ and Salīm, it can only be proven that two scholars did exist and had the chance to

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[81]Schacht, *Origins*, 37.

[82]Azami, *On Schacht's*, 168.

[83]Juynboll, "The Date of the Great *Fitna*," *Arabica* 20 (1973), 158.

study from a common source. According to Dhahabī, Nāfiᶜ was a freed man of Ibn ᶜUmar and served the latter for more than 30 years. Salīm was the son of Ibn ᶜUmar and died 32 years later after his father. Therefore, it is safe to assume that both of them had similar chances to study from Ibn ᶜUmar.[84] Since ᶜAbdullāh b. Dīnār was also a freed man of Ibn ᶜUmar and had a similar opportunity to study from the latter, he and Nāfiᶜ could transmit the same *aḥādīth* from a single common source as they lived 60 or 70 years together in the same city and were freed men of the same person. Schacht also has assailed the chain of Mālik - Nāfiᶜ - Ibn ᶜUmar which is based on two grounds: the age of Mālik and the position of Nāfiᶜ as the client of Ibn ᶜUmar. In his own words: "But as Nāfiᶜ died in 117 A. H. or thereabouts, and Mālik in 179 ,A. H. their association can have taken place, even at the most generous estimate, only when Mālik was a little more than a boy."[85] He says in the footnote that "nothing authentic is known of Mālik's date of birth."[86] Azami criticizes Schacht's omission of the birth of Malik which, according to him, can lead only to erroneous conclusions.[87] He further comments:

> If we consult the bibliographical works, however, we find that most of the scholars, even those who were born a little earlier than Mālik, state that he was born in 93 A. H., ; a few put in the early months of 94 A. H., a few in 90 A. H., and a few in 97 A. H. . But there is no one who maintains any date later than this. So, Mālik was at least 20 years old, if not 24 or 27, when Nāfiᶜ died.[88]

Regarding Nāfiᶜ as a client of Ibn ᶜUmar, Azami only gives his comment in general conclusion, saying: "But why should we believe that a man is dishonest because

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[84]Ibid, 169.

[85]Schacht, *Origins*, 176-177.

[86]Ibid, 176, 4.

[87]Azami, *Studies*, 245

[88]Azami, *On Schacht's*, 171

of this relationship, when he was clearly accepted among his contemporaries and the later authorities as most trustworthy?"[89] It is understandable, since Azami realizes that it has already preoccupied Schacht's mind that the *isnād* Nāfiᶜ -- Ibn ᶜUmar is a 'family *isnād*', a fact which, according to him, is generally an indication of the spurious character of the tradition in question. The family *isnād* will be discussed in the following pages.

Schacht gives four examples as the evidence of what he calls "the general uncertainty and arbitrary character of *isnāds* ", to which Azami also presents his critique. Schacht mentions two stories about a *mudabbar* slave, each with a different *isnād* (see chapter 1, 24). But, Azami says that there is no basis for this example for a charge of uncertainty, because the two stories are fundamentally different. The two stories are abou people concerned (Ḥafsa and ᶜĀᶜisha) in the fate of the slaves of whom one was killed and the other was sold. As for the *isnād* itself, he blames Schacht's suspicions of two people with the same name, and questions "[A]re people with identical names or only slight variations in name fictitious?" Moreover, he notes:

> There are scores of scholars of the early second century who transmitted traditions from these two authorities and differentiated between them. One of them, Muḥāmmad b. ᶜAbdur Raḥmān b. ᶜAbdullah, was appointed governor of Yamāma by ᶜUmar b. ᶜAbdul ᶜazīz and died in 124 A. H.. The second one is Muḥammad Abū Rijāl, the date of whose death is not mentioned. As Mālik explicitly confirms that he learned from him personally, there is no reason to suspect Mālik's statement. Since all these three belonged to Medina, there was every possibility that they met each other.[90]

Schacht contends that *isnāds* were progressively "improved" by forgery and fabrication, early imperfect *isnāds* being completed by the time of the classical

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[89]Ibid.

[90]Ibid, 178.

collection. He comments on *Āthār* Abū Yūsuf: "The editor has collected in the Commentary the parallels in the classical and other collection; a comparison shows the extent of the progressive, improvement, and backward growth of *isnāds*."[91]

At this point, Azami charges Schacht, that like other Orientalist, misuses the materials for the study of *isnād* . Instead of using pure *ḥadīth* literature, they use *sīra* and *ḥadīth-fiqh* literature. He also mentions that the early lawyers realized the pivotal importance of *isnāds* , but for the sake of brevity, they chose not to quote all the authorities. They were mainly concerned in the legal issues and did not mentions *isnād* when the *ḥadīth* in question was famous among scholars. For example, Abū Yūsuf, who admitted not having recorded all the *aḥādīth* and *isnāds* at hand in order to avoid too long a book.[92] "Even Shāfiʿī remarks in places that he has heard unbroken *isnāds* for the *aḥādīth* he quotes, but cannot remember them at the time."[93]

Azami also reminds the reader that these scholars' knowledge was limited, and that they deleted in their work many details that were familiar to them. There are several reasons for this omission; the *isnād* is entirely omitted where other sources prove they knew it; partially omitted where other sources prove they knew it in full; referring to only one channel of *isnād* from several accessible to them; and using the term "from a man" or "from a reliable man" when the authority at issue is elsewhere cited by name.[94]

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[91]Schacht, *Origins*, 165.

[92]Azami, *On Schacht's*, 183.

[93]Majid Khadduri, *Islamic Jurisprudence* : Shāfiʿī *Risāla* (Baltimore: Johns hopkins, 1961), 254.

[94]Azami, *On Schacht's*, 184.

As has been mentioned earlier, Schacht takes Mālik who refers, without *isnād*, to instructions on the *zakāt* tax from ᶜUmar as an example to support his argument about the creation of additional authorities. Earlier, he writes: "Tr. II, 9 (b): Shāfiᶜī - Abū Kāmil and others - Ḥammād b. Salama Baṣrī - Thumāma - [of Basra] - his grandfather Anas b. Mālik - his father, Mālik gave him the copy of a decree of Abū Bakr on the *zakāt* tax and said: 'This is the ordinance of Allāh and the *sunna* of the Prophet.' A parallel version in 9 (c) has; 'Abū Bakr gave him the *sunna* in writing, and then, Schacht comments: "this tradition can be dated to the time of Ḥammād b. Salama; the connection between Ḥammād and Thumāma is very weak."[95]

But Azami argues that it is sufficient to refute these arguments by referring to Abū Yūsuf who transmitted this *ḥadīth* through: Zuhrī - Sālim - Ibn ᶜUmar - the Prophet. The Prophet dictated a decree on *zakāt* , which was followed by Abū Bakr and then ᶜUmar. Concerning the *ḥadīth* of Thumāma, he says that Anas gave him the document which was written by Abū Bakr for him. This *ḥadīth* , says Azami, has a perfect and proper *isnād*, but it is not approved by Schacht who thinks that it can be traced to the time of Ḥammād b. Salamah (d.167 A. H.) The former further argues in hyphotetical way, "But suppose that it can be so dated; then surely Schacht should have mentioned that in the first half of the second century this tariff was attributed to the prophet instead of "projecting forward" one hundred years to the time of Ibn Ḥanbal later."[96]

Moreover, according to Azami, Schacht commits mistakes. In one *isnād*, he quotes: Thumāma - his grandfather Anas b. Mālik - his father Mālik, but this is a

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[95]Schacht, *Origins*, 73.

[96]Azami, *On Schacht's*, 189.

wrong *isnād* . The right *isnād* is as follows: Ḥammad - Thumāma - Anas - Abū Bakr. Schacht is also against the statement of early biographers when he claims the connection between Ḥammad and Thumāma is very weak.[97]

Where as Schacht believes that every family *isnād* is spurious, J. Robson has said in this matter:

> Was the family *isnād* invented to supply apparent evidence for spurious traditions, or did genuine family *isnāds* exist which later served as models? It seems better to recognize that they are a genuine feature of the documentation, but to realize that people often copied this type of *isnād* to support spurious traditions. Therefore, while holding that family *isnāds* do genuinely exist, one will not take them all at face value.[98]

Abbott is also of the opinion that there was a positive parallel between the development of traditions and the development of the family *isnād* relating to the chronological transmission of the tradition. Henceforth, the position of the family *isnād* is seen as a confirmation of her conclusion that there is a clear continuation of the traditions.[99]

Azami, in line with Robson, does not examine Schacht's example of the family *isnād* that he claimed spurious since the former holds that early scholars had researched the category of the family *isnād* thoroughly such as Maʿmar b. Muḥammad from his father, ʿĪsā b. ʿAbdallāh from his father, Kathīr b. ʿAbd Allāh from his father. Mūsā b. Maṭīr from his father and Yaḥyā b. ʿAbd Allāh from his father. They also had dismissed suspect *isnāds* and *aḥadīth* . He further questions: "[I]f a statement of a father about his

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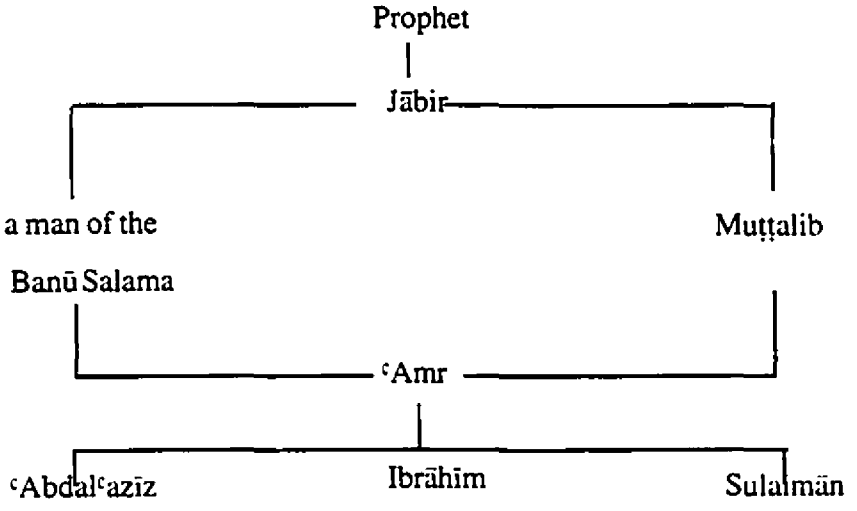
[97]Ibid.

[98]J. Robson, "The *isnād* in Muslim Tradition," *Glasgow University, Oriental Society Transanctions* 15 (1955), 23.

[99]Abbott, *Studies*, 37-39.

son or vice versa, or a wife about her husband, or a friend about a friend, or a colleague about a colleague is always unacceptable, then on what basis could a biography possibly be written?"[100]

We have shown the diagram which is drawn by Schacht to support his argument regarding the common link theory (chapter 1). However, according to Azami, since the name of ᶜAmr's teacher, Muṭṭalib, occurs twice, the diagram should be drawn as follows:



Moreover, Azami claims that Schacht either disregarded the text of *Ikh.* 294 or did not conceive it. Shāfiᶜī, Azami says, "comparing three students of ᶜAmr, makes it clear that ᶜAbdalᶜaziz was wrong in naming the authority of ᶜAmr as a man of Banū Salama. Ibrāhīm b. Abī Yaḥyā was a stronger transmitter than ᶜAbdalᶜazīz and his statement is attested by Sulaimān as well." Hence, according to Azami, "it appears that

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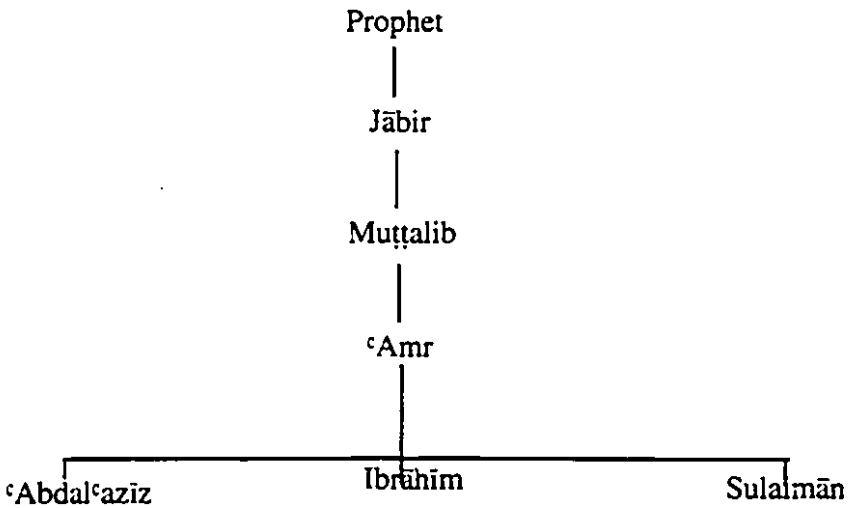
[100]Azami, *On Schacht's*, 197.

there is only one channel through which ᶜAmr has received his information." Consequently the diagram would emerge as follows:[101]



Finally, Azami examines *ḥadīth Barīra* which is used by Schacht to show how "the argument drawn from a common transmitter can be used, together with other considerations, in investigating the history of legal doctrines."[102] There are at least five principles employed by Schacht to trace the legal history of this doctrine: customary practice at the time, the idea that a common link implies forgery, creation of new *aḥādīth* to support one with a suspect *isnād*, suppression of undesirable material, and insertion of authorities.[103]

According to Schacht from the first half of the second century A. H. the sale of *walaʾ* of a manumitted slave was customary and considered valid.[104] This implies that

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[101]Ibid, 199.

[102]Schacht, *Origins*, 172.

[103]Azami, *On Schacht's*, 200

[104]Schacht, *Origins*, 173.

any *ḥadīth* transmitted from the Prophet to object to this customary practice must be spurious. But, Azami claims that there is no evidence in support of Schacht's idea that *aḥadīth* prohibiting the sale of *walaʿ* are of late origin, because Schacht only bases his argument on a single piece of evidence recorded by Ibn Saʿd, V, 309, about the selling of *walaʾ of* Abū Maʿshar, without giving his source, yet Schacht considers it genuine. But when the same Ibn Saʿd records eight documents giving his sources of information concerning the *Barīra* incident, Schacht declares them spurious.[105] Therefore, according to Azami, it is difficult to see on what is the criteria for accepting Ibn Saʿd concerning Abū Maʿshar. Taking his contra arguments as a whole Azami successfully demonstrates the invalidity of Schacht's arguments above.[106]

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[105]Ibid, 174

[106]Azami, *On Schacht's*, 201-205.

CONCLUSION

Having discussed both the arguments in favor of and against the existence of Islamic law in the first century of the Hijra, it is our contention that Islamic law had existed since the early years of the first century of the Hijra. Several pieces of evidence have been shown by some scholars to support this argument. Ẓafār Isḥāq Anṣārī has claimed that the Qur'ānic legal injunctions had been discussed from early Islam and constantly remained the basis of legal speculation which led to the deliberate growth of the implications of its legally relevant verses-- a process which conforms to the rise of legal problems in early Islamic society. For example, N. J. Coulson and David S. Powers have shown that Muslims had been discussing the field of family law, particularly the field of inheritance since the beginning of the first century of Islam as the result of problems posed by the Qur'ānic injunctions. Thus, certain legal cases, such as the one pertaining to one-third bequest, Minbariyya, Ḥimāriyya, Kalāla, among others, were familiar to the Muslim scholars of the first century of the Hijra.

Another piece of evidence concerns the role of Muḥammad in formulating Islamic law. As the Prophet, he was responsible for guiding his *ummah* in the light of the Qur'ān. Therefore, he was the one who introduced and explained the problematic legal verses of the Qur'ān, especially in the field of inheritance and family law which needed immediate solutions. He was also the one who applied the Qur'ānic injunctions to his life. S. D. Goitein affirms that the development of Islamic law was due to the Prophet himself who envisaged law as a part of divine revelation. Based on the evidence from the Qur'ānic verses particularly *Sūrat al-Mā'idah*, Goitein puts the date of the fifth year of the Hijra as the birth hour of Islamic law.

Wael B. Hallaq focuses on the role of *muftī* and their activities in issuing *fatwa*, and in line with Goitein's idea he suggests that the Qurʾānic law was already taking roots during the Medinese phase of the Prophet's career. The activities of *muftī*, according to Hallaq, started during early Islam as the result of persistent efforts of the companions of the Prophet who were involved in legal activities and at the same time might also be included as *muftīs*.

Sunna of the Prophet in the system of Islamic legal practice should be originally attributed to the Prophet not to the community as Schacht claims. M. M. Bravmann has shown that the term *sunna* has been familiar to Muslims and had been attributed to the Prophet from the very beginning of Islam. Though he admits that certain practice of the Prophet may be based on pre-Islamic Arabia or even foreign sources, as Schacht insists, still such practice were instituted by the Prophet in a specific way that they became tantamount with Islamic concept.

All of the Prophet's actions, including his legal decisions, were transmitted orally and recorded in written form from the early years of the first century of the Hijra. This proves that most of the Prophetic traditions fundamentally should be considered as authentic, except when there is some evidence to show their weakness. Nabia Abbott confirms that the writing of the Prophetic tradition had taken place since the Prophet's life time, conducted by his secretaries and his companions. The transmission of these traditions was based on the system of *isnāds* which had been introduced during the Prophet's life time and had been practiced continually by the companions of the Prophet and their successors. M. M. al-Azami argues that the Prophetic traditions had been transmitted in many places simultaneously since early Islam.

To sum up: the development of Islamic law, in fact, originally started from the lifetime of the Prophet as an effort to determine and define the religious ethic to the Muslim community at the time. It was Muḥammad who applied divine law, as written in the Qur'an, to early Islamic society as a part of his prophetic duty. This legal duty was partly continued after him by some of his companions and successors who were involved in legal activities, in order to fulfill the demand of legal advice in a nascent Islamic society. Hence In the light of development of Islamic law, historical circumstances in the first century of the Hijra, must be taken into account as a root without which Islamic law can not be completely comprehended. Therefore, the notion that there is a legal vacuum in the greater part of this century is difficult to conceive.

BIBLIOGRAPHY

Abbott, Nabia "Ḥadith Literature-II: Collection and Transmission of Ḥadith." in *Arabic Literature to the End of the Umayyad Period*, ed. A. F. L. Beeston *et al.* Cambridge: Cambridge University Press, 1983, 289-98.

Abbott, Nabia. *Studies in Arabic Literary Papyri.* Vol. 2, Qur'anic Commentary and Tradition. Chicago: The University of Chicago Press, 1957.

Anderson, J. N. D. Review Of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. In *DieWelt des Islams* 2 (1952): 136.

Anderson, J. N. D. "Recent Developments in Shari'a Law." *Muslim World* 40 (1950): 244-256.

Anṣari, Ẓafar Isḥaq. "The Early Development of Islamic Fiqh in Kufah with Special reference to the works of Abū Yūsuf and Shaibani." Ph. D. diss., McGill University, 1966.

Anṣari, Ẓafar Isḥaq. "The Authenticity of traditions: A critique of Joseph Schacht's argument *e silentio.*" *Hamdard Islamicus* 7 (1984): 51-61.

Azami al-, M. M. *On Schacht's Origins Of Muhammadan Jurisprudence.* Riyadh: King Saud University, 1985.

Azami al-, M. M. *Studies in Early Ḥadith Literature.* Beirut: al-Maktab al-Islami, 1968.

Bravmann, M. M. *The Spiritual Background of Early Islam : Studies in Ancient Arab Concept.* Leiden: E. J. Brill, 1972.

Coulson, N. J. "Correspondence." *Middle Eastern Studies* 3 (1967): 195-203.

Coulson, N. J. *A History of Islamic Law.* Edinburgh: Edinburgh University Press, 1964.

Duri, A. A. "Al-Zuhri: A Study on the Beginning of History writing in Islam." In *SOAS Bulletin* 19 (1957): 1-12.

Fitzgerald, S. V. Review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. In *The Law Quarterly Review* 69 (1953): 395-9.

Fitzgeraid, S. V. "The Alleged Debt of Islamic to Roman Law." *Law Quarterly Review* 67, Jan. (1951): 81- 102.

Gibb, H. A. R. Review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. In *Journal of Comparative Legislation and International Law* (1951): 114-6.

Gibb, H. A. R. *Mohammedanism*. ed. 2. Oxford: Oxford University Press, 1970

Goitein, S. D. *Studies in Islamic History & Institutions*. Leiden: E. J. Brill, 1968.

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

Goldziher, Ignaz. *Introduction to Islamic Theology and Law*. Trans. Andras and Ruth Hamori. New Jersey: Princeton University Press, 1981.

Goldziher, Ignaz. *Muhammedanische Studien*. Translated by S. M. Stern, London, 1967.

Goldziher, Ignaz. "The principle of Law in Islam." In *The Historians' History of the World* 8 (1904): 294-304.

Guillaume, Alfred. Review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. In *Bulletin of the School of Oriental and African Studies* 16 (1954): 176-7:

Hallaq, Wael B. "From *fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law." In *Islamic Law and Society* 1, 1, 1994: 29-65.

Ibn al-Jawzī. *Kitab al-Mawḍūʿāt*. ii,. Ed. ʿAbd al-Raḥman Muḥammad ʿUthman, 3 vols. Medina: 1966-8.

Ibn al-Muqaffaʿ. "Risala fī al-Ṣahaba" in *Rasāʾil al-Bulaghāʾ*. Ed. Muḥammad Kurd ʿAli. Cairo: 1913.

Ibn Saʿd, Muḥammad b. Saʿd. *Kitab al-Ṭabaqat al-Kabir* . 9 vols. Ed. E. Sachau Leiden: 1904-1940.

Jeffrey, A. "Review Of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht." *Middle East Journal* 5 (1951): 392-94.

Juynboll, G. H. A. *Muslim Tradition: Studies in Chronology, Provenance and authorship of early Ḥadīth*. Cambridge: Cambridge University Press, 1983.

Jyunboll, G. H. A. "The Date of the Great *Fitna*." *Arabica* 20 (1973): 142-59.

Khadduri, Majid. *Islamic Jurisprudence : Shafiʿī Risala*. Baltimore: Johns hopkins Press, 1961.

Liebesny, Herbert J. *The Law of the Near & Middle East: Readings, Cases, & Materials*. Albany: State University of New York Press, 1975.

Malik, Ibn Anas. *Muwaṭṭaʾ*. iv. version Yaḥya Ibn Yaḥya, with the commentary of Zurqani, 4 vols. Cairo: 1310.

Margoliouth, D. S. *Early development of Mohammedanism*. London: 1914.

Powers, David S. *Studies in Qurʾan and Ḥadith:The Formation of the Islamic Law of Inheritance*. London: University of California Press, 1986.

Powers, David S. "The Will of Saʿad B. Abi Waqqaṣ: A Reassessment." *Studia Islamica* 58 (1983): 33-53.

Rahman, Fazlur. *Islam*. Chicago: The University Chicago Press, 1966.

Rahman, Fazlur. *Islamic Methodology in History*. Karachi: 1965.

Ritter, H. Review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. *Oriens* 4 (1951): 308-12.

Robson, J. Review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. *The Muslim World* 42 (1952): 61-63.

Robson, J. "The *isnad* in Muslim Tradition." Glasgow University, *Oriental Society Transanctions* 15 (1955): 15-26.

Schacht, Joseph. "Foreign elements in Ancient Islamic Law." In *Journal of Comparative Legislation and International Law* 32 (1950): 9-17.

Schacht, Joseph. "A Revaluation of Islamic Tradition." *Journal of the Royal Asiatic Society* 49 (1949): 143-54.

Schacht, Joseph. *An Introduction to Islamic Law*. Oxford: Clarendon, 1964.

Schacht, Joseph. "Law and Justice." In *The Cambridge History of Islam*. Volume 2. Cambridge: Cambridge University Press, 1970.

Schacht, Joseph. "Modernism and Traditionalism in a History of Islamic Law." *Middle Eastern Studies* 1 (1965): 393.

Schacht, Joseph. "Pre Islamic Background and Early Development of Jurisprudence." In *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny. Washington D.C.: The Middle East Institute, 1955, 28-56.

Schacht, Joseph. "The law" In *Unity and Variety in Muslim Civilization*. Ed. G. E. Von Grunebaum. Chicago: University of Chicago Press, 1955.

Shafiʿi, Muḥammad Idris. *al-Risālah*. Edited by Sheikh Aḥmad Muḥammad Shākir, Cairo, 1940.

Shafi'i, Muḥammad Idris. "Kitab Ikhtilaf Malik wa al-Shafi'i." In *al-Umm*. Cairo: 1357

Shaibani. *Muwaṭṭa'*. version of Malik *Muwaṭṭa'*. Lucknow: 1297.

Snouck Hurgronje, C. *Muhammadanism*. New York: Putnam, 1916.

Snouck Hurgronje, C. *Selected works of C. Snouck Hurgronje*. Edited by G. H. Bousquet and Joseph Schacht. Leiden: E. J. Brill 1957.

Tyan, E. *Historie de l' organisation judiciare en pays d' Islam*. Leiden, 1960.

Watt, W. M. "The reliability of Ibn Ishaq's Source." In *Early Islam*. Edinburgh: Edinburgh University Press, 1970.

Watt, W. M. Review Of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht. *Journal of the Royal Asiatic Society* (1952): 91.