CHAPTER 2

The Development of the Dogmatics of Islamic Law

The Dogma of the Legal Sources and the Methodology of the Deduction of Laws from the Sources of Law (uṣūl al-fiqh)

1 Introduction

Like the development of the institutions of the law, the emergence of the dogmatics of Islamic law took place in a rather improvised fashion, heterogeneous and over a long time. The sources are comparatively sparse, in particular for the earliest period. Of the few texts that have been transmitted as books (*kitāb*, pl. *kutub*) by no means all were actually prepared for publication by the author named; a number are later compilations by pupils and others.[1] The wealth of works of legal literature does not date back further than the third/ninth century. On the whole we know very little about the degree of effectiveness they had in practice, as hardly any sources of everyday legal affairs, such as documents and charters which could provide the necessary information, survive from the time before the ninth/sixteenth century. It is remarkable that some of the fundamental texts were composed at the explicit request of rulers: this alone would suffice to relativise the, occasionally exaggerated opposition between scholars and political power.[2]

All of this is in stark contrast to the idea, widely held later, of a coherent system with a self-referential basis. According to this kind of traditionally grown understanding, the foundations of the sharia are God-given, and consequently immutable. As we mentioned at the beginning, the separation of legal norms and religious rules is indeed possible within Islam as well, even though their mutual boundaries are not always clearly defined. The two spheres do, however, share two important principles. Firstly: everything that is not forbidden is allowed (the so-called *ibāḥa aṣlīyya*; cf. also 4.4.b below regarding contract law); secondly: there is no obligation unless there is a specific decree to that effect (the so-called *barā'a aṣlīyya*).[3] It is important to emphasise this because there is

1 Cf. Görke, Das kitāb al-amwāl, 7 ff. with further references.

2 Cf. Jokisch, Islamic Imperial Law, 522 ff.

3 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 29; cf. also the instances in Ramadan, Das Islamische Recht, 68 ff., and Löschner, Die dogmatischen Grundlagen, 214 ff. Contemporary Quran exegesis emphasises this aspect as well (cf. Uçar, Moderne Koranexegese, MS p. 139 with further

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a widely held opinion, based on an incorrect preconception, which erroneously asserts the contrary.[4] A rule of this kind, expressing a universal prohibition, is – as far as we can tell – found only in the writings of the early Abbasid jurist ʿĪsā 44
ibn ʿAbān,[5] whose view does not, however, appear to have made any perceptible impression.

The first task was, and is, indeed, in every legal system, to ascertain all the relevant sources of the law. Islamic law encounters particular difficulty here, as there are many areas for which there is no precise and case-relevant information in either the Quran or the prophetic tradition. Consequently a supplementary collection of legal sources and instruments of the deduction of laws had to be developed. A separate branch of jurisprudence evolved, which was concerned with the 'roots of law deduction' (*uṣūl al-fiqh*).[6] The counterpart to this field is the application of these rules and instruments in the practice (*furūʿ*, 'branches').

As we have mentioned before, we do not have much information on the beginnings of the Islamic legal system. What is reasonably certain is that the Quran,[7] the prophet Muhammad's relevant legal practice and his companions' (*ṣaḥāba*) and the early caliphs' continuation of this practice were guidelines for the evolving legal system. This is true independently of whether the traditions on the subject stand up to scrutiny of their authenticity.[8] One such tradition was and is quoted particularly frequently:[9] Before sending Muʿādh ibn Jabal to Yemen as a judge,[10] Muhammad asked him on what he was going to base his

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references). According to one tradition, Muhammad already reproached those Muslims who asked too many questions, provoking prohibitions; cf. Krawietz, Hierarchie, 287.

4 Cf., in the place of many, Spies/Pritsch, Klassisches Islamisches Recht, 220, 222; on contract law cf. Schacht, Introduction, 144. In agreement with the revised opinion e.g. Milliot, Introduction, 205, marginal note 193; Ramadan, Das Islamische Recht, 67, 71 ff. with further references.

5 Cf. the references in Josef van Ess, Theologie und Gesellschaft, vol. 2, 302; vol. 4, 573, to whom I owe this information.

6 Cf. only the concise introduction in Jokisch, Islamic Imperial Law, 517 ff. with further references.

7 Cf. Crone/Hinds, God's Caliph, 54 and *passim*; Hallaq, History, 8.

8 Still, Muhammad's 'farewell sermon' (*khuṭbat al-wadāʿ*) in Ibn Hishām's Al-sīra, vol. 4, 186, contains the statement that one must not diverge from God's book and his prophet's 'sunna' (*lan taḍillu abadan* (…) *kitāb Allāh wa-sunnat nabiyyihi*).

9 Its authenticity is doubtful all the same, concerning the different opinions cf. Lucas, Legal Principles, 289, 317 ff. with further references; Jokisch, Islamic Imperial Law, 526 ff. with further references.

10 The sources differ regarding the scope of his responsibilities: according to some accounts

administration of justice. Muʿādh replied that he would first search in God's book; if he could not find a solution there, he would look in the prophet's sunna. In addition he would strive indefatigably to form his own opinion (*ajtahidu raʾyī*).[11] The verb in this phrase already shows the key concept for the flexible administration and further development of Islamic law: ijtihad (Ar. *ijtihād*, derived from the verb *ijtahada*), independent rational deliberation.

Considering the many legal questions not resolved in the Quran and in the evolving prophetic tradition, the third of the above-named three possible paths is likely to have been the most common at first. The representatives of this guild were not called the *ahl al-raʾy* (people of their own opinion) for nothing. According to Goldziher[12] the denotation of the terms *fiqh* and *raʾy* even coincided at first. A quarrel between them and the so-called *ahl al-ḥadīth* (people of hadith) is documented in the second/eighth century.[13] The latter preferred a closer connection with the prophetic tradition, even though the – occasionally fierce – opposition between the two trends in later times do not seem to be quite conform to reality. The concept of *raʾy* clearly underwent a change of meaning with increasingly negative connotation. If we consider the tradition of the dialogue between Muhammad and Muʿādh ibn Jabal to be authentic, the concept has a positive connotation, while it would later be equated with unlawful arbitrary decisions increasingly frequently.

Harald Motzki, however, has proved that the strict separation between fiqh and hadith literature, which had been presumed for a long time, did not in fact exist in this form.[14] Joseph Schacht's[15] theory, according to which the doctrine the sources of the law was devised later in a kind of historical retrospective, is not entirely tenable any more.[16] It is true that a certain canonisation of the

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he was sent to take up the office of governor, in the course of a military expedition or in order to teach the Quran; cf. Tyan, Histoire, 70 with further references.

11 Transmitted e.g. in Aḥmad ibn Ḥanbal's *Musnad*, vol. 5 (Beirut edition 1413/1993), 272 f. (no. 22068); quoted in Salqīnī, Al-muyassar, 73, 142; concerning criticism cf. Muslehuddin, Islamic Jurisprudence, 44.

12 Goldziher, Die Ẓâhiriten, 18 f.

13 Cf. Ibn Khaldūn, Al-muqaddima, 446; Motzki, Anfänge, 17 with further references; Hallaq, Origins, 74 ff.; Melchert, Formation, 1 ff.

14 Motzki, Anfänge, 20, 68 ff.

15 The Origins, 190 ff.

16 Motzki, Anfänge, 28 ff., 262 f. Cf. already Coulson's criticism of methodology, History, 64 ff., and Aʿẓamī, Studies in Early Ḥadīth Literature.

legal sources took place only at the beginning of the third/ninth century in the fundamental works by Muḥammad ibn Idrīs al-Shāfiʿī,[17] who had studied the doctrines of the Malikite and Hanafite schools thoroughly, and his successors. The effect of this systematisation was so comprehensive in its tendency[18] that the present study will take it as its basis. Those wishing to take into account the actual historical situation as well, must free themselves from the idea that the transmitted formation of the system had been completed to any degree, or even clearly delineated, during Muhammad's lifetime or immediately afterwards. On the contrary, we must presume a gradual development of the systematisation.[19]

Special conditions obtain in the development of Shiʿite Islamic law: the first surviving works concerning *uṣūl al-fiqh* date back to around 200 years after al-Shāfiʿī's fundamental work.[20] They were composed during a climate that was comparatively favourable to the Shiʿites, as the Buyids, the de facto rulers of the Abbasid state (334–447/945–1055) professed the Shiʿa.[21] The most influential works mentioned are Shaykh Mufīd's (d. 413/1022) lost *Uṣūl al-fiqh*, further works from his pen and those of his pupils.[22] Only after the 'occultation' of the twelfth and last imam did the Twelver Shiʿa, the dominant group among the Shiʿites (cf. 1.2 above), feel compelled to develop a coherent concept of the doctrine of the legal sources and their interpretation.[23]

Despite basic similarities, the relevant works usually differ clearly from the Sunni interpretation in their conception and contents. Compared to Sunni texts they are frequently more open to independent reasoning and less

17 Concerning the history of his important *Risāla*, cf. Khadduri, Risala, 19 ff.

18 Cf. Schacht, Origins, 1 f.; Hallaq, Origins, 127 ff.; Muslehuddin, Islamic Jurisprudence, 32; Stewart, Islamic Legal Orthodoxy, 30 ff. with further references, also concerning divergent opinions.

19 Regarding the developing 'generalisation' and systematisation cf., for instance, Scholz, Fortbildung der Scharia, 95 ff. with further references.

20 Cf. Stewart, Islamic Legal Orthodoxy, 133 ff. A lost work by the Shiʿite scholar Abū Sahl Ismāʿīl ibn ʿAlī al-Nawbakhtī bore the programmatic title *Kitāb naqḍ risālat al-Shāfiʿī* (Criticism/rejection of al-Shāfiʿī's risāla); cf. Stewart, Islamic Legal Orthodoxy, 178.

21 Buyid rulers insisted e.g. on calling themselves *amīr al-umarā'* (commander of commanders), a title which carried real power; later they added the title King of Kings (Ar. *malik al-mulūk*, Pers. *shāhānshāh*), cf. Busse, Chalif, 26, 33 f., 178 f. and *passim*. Cf. also Stewart, Islamic Legal Orthodoxy, 54 ff., also concerning Sunni opposition.

22 Löschner, Die dogmatischen Grundlagen, 113 f. with further references.

23 Op. cit., 32 and *passim*; 112 ff. Other branches of the Shiʿa such as the Ismailites (sub-divided into Nizari and Mustāʿli/Bohra) still see themselves as being connected to the imam and do not need to train a specific group of legal scholars; cf. Stewart, Islamic Legal Theory, 177.

painstakingly involved in questions of detail. In-depth discussions of problems of legal theory or of ijtihad are typical,[24] while they are found comparatively rarely in this form in Sunni literature. A prominent exponent is al-ʿAllāmat al-
46 Ḥillī (d. 725/1325) of the school of Ḥilla in southern Iraq. He was the first to bear the epithet *Āyatullāh* ('sign of God'), and converted the Mongol khan Öljaytü to the Shiʿite faith.[25] The strong focus on the (occulted) imam as the final instance only seemingly contradicts this; after all, he was not actually available to provide a decision. Earlier Shiʿite texts[26] understand the concept of *uṣūl al-fiqh* in a narrower sense than later ones: instruments of deducing and interpreting the law beyond the Quran, the specifically interpreted sunna and similarly specific consensus as well as 'reason' (*ʿaql*) were either not yet available[27] or were explicitly dismissed, as e.g. in the works of the fourth-/tenth-century Fatimid Sevener Shiʿite al-Qāḍī al-Nuʿmān[28] or the writings of the Twelver Shiʿite minority of the Akhbārī.[29]

In every legal systems three questions require clarification once norms as relevant as possible have been established, and Muslim jurists have asked these questions since earliest times: How can the relation between norms be determined if they overlap but are not equivalent? From among several norms with (at least partly) equivalent substance, which one should be given priority? Is there a hierarchy of norms with coincident substance, which might be deduced from the respective origin of the norm?

The first question looks at the relation between general and specific regulation. The competition is resolved according to the principle of speciality using the terminology employed for the first time by al-Shāfiʿī:[30] the more specific

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24 From among modern Shiʿite literature cf. e.g. Muhammad al-Ḥusaynī al-Shīrāzī, Al-fiqh, vol. 1, Kitāb al-ijtihād wa-l-taqlīd, Beirut, 2nd ed. 1407/1987, whose thoughts on the subject comprise nearly 500 printed pages. A concise overview over Shiʿite *uṣūl* doctrine may be found in Yūsuf Muhammad ʿAmrū, Al-madkhal, 64 ff.

25 Cf. Halm, Der schiitische Islam, 116; Schneider, Iftāʾ in der Schia, 77 with further references.

26 Cf. Halm, Der schiitische Islam, 111 ff.; Löschner, Die dogmatischen Grundlagen, 32 ff.; Stewart, Islamic Legal Orthodoxy, 133 ff. with further references.

27 Löschner, Die dogmatischen Grundlagen, 41 and *passim*.

28 According to him the Fatimid caliph is the last source of legal authority besides the Quran and the sunna of the prophet and the early imams, see Stewart, Islamic Legal Orthodoxy, 179.

29 Cf. Stewart, Islamic Legal Orthodoxy, 176 ff., 189 ff. with further references. This branch with its emphasis on scripture, recognising only the Quranic text and accepted sayings of the prophet Muhammad and the imams, was in the end unable to prevail against the dominating *uṣūlī* school (cf. Halm, Der schiitische Islam 126 ff.).

30 Al-risāla, 53 ff. (marginal no. 179 ff.) and *passim*; transl. in Khadduri, Risala, 96 ff.

regulation (*al-khāṣṣ*) overrides the more general one (*al-ʿāmm*). Nevertheless, it is far from easy to discern whether a provision is meant to be specific or general. In al-Buwayṭī's abridgment of al-Shāfiʿī's *Risāla* we find chapters dealing with general wording in the Quran and the sunna meant to be specific, and with expressions that appear specific at first sight, but in fact have a general meaning.[31]

The second question tackles chronological competition. The position of Islamic law corresponds with the modern Western position to the extent that the later regulation abrogates the earlier one of the same rank and with the same substance (*naskh*, displacement, abrogation). The context-specific terminology has *nāsikh* (the later regulation which abrogates the earlier one) and *mansūkh* (the abrogated norm).[32] Divergent opinions are found for instance concerning whether norms of different hierarchical status may stand in a relation of abrogation to one another; this problem is discussed in the context of the relation between the Quran and the prophetic tradition. Similar debates, but employing a different terminology, are conducted concerning the duration of the binding nature of established interpretations (*taqlīd*) and the permissibility of searching for new interpretations (*ijtihād*).[33]

Overall we can observe a tendency through several centuries of the clearly comprehensively employed independent approach and interpretation of the early period becoming more restricted in favour of the canonisation of legal 47
sources and the results of their interpretation.[34] On the other hand, the *naskh* theory led Shiʿite authors in particular to develop dynamic energy when interpreting sources: They debate the argument according to which there could not possibly be any derogation within the Quran, as the divine law-giver only provides eternally valid rules which offer advantages and avoid disadvantages. A

31 Cf. El Shamsy/Zysow, al-Buwayṭī's abridgment, 327, 335 f. (chapters 5 and 6, Arabic text), 347 f. (English translation).

32 For a detailed overview cf. e.g. al-Shāfiʿī, Al-risāla, 106 ff., 311 ff. and *passim*; Ibn Sallām, *Al-nāsikh wa-l-mansūkh fī l-kitāb wa-l-sunna*; al-Nakhkhās, *Kitāb al-nāsikh wa-l-mansūkh*; al-Ḥāzimī, *Al-iʿtibār fī l-nāsikh wa-l-mansūkh min al-āthār*. A support for *naskh* is found in particular in sura 2:106 ('And for whatever verse (of the words of the revelation) We abrogate or cast into oblivion, We bring a better one (in its place) or the like of it'); regarding the problem of its import cf. Burton, Sources, 205 ff. and *passim* with further references; Souaiaia, The Function, 243 ff. and *passim*.

33 Cf. e.g. Krawietz, Hierarchie, 70 ff. with further references esp. from works of contemporary legal history; Al-Alwani, Issues, 70 ff.

34 Cf. Powers' studies (Law, esp. 230 ff. and *passim*) on the Maghreb under the Marinids, based on sources focussing on legal practice.

later alteration would consequently change something good into something bad. This is countered with the argument that the evaluation of good or bad might be different depending on the situation or the point in time.[35] Of course, if according to this view Quranic rules may be dependent on the time and the situation, this must be assumed to an even greater degree with regard to all other sources, too.

The third question, finally, is aimed at the hierarchy of legal sources in cases where the respective sources are of unequal rank. This has been clarified to a significant extent in the case of the two highest-ranking sources, the Quran and the prophetic tradition (sunna), but by no means unanimously. With regard to all the remaining sources and instruments of interpretation there are differences, some very clear-cut, between the opinions of the past and the present. They will be taken into account in the following when individual sources are presented. Birgit Krawietz has produced an excellent study of the hierarchy of legal sources in transmitted Sunni Islam, including many references, which provides much detail on the topic.[36]

The question of comprehending the meaning of the norm has even higher priority. Can it be understood unambiguously from the text, or is an interpretation of the contents required?[37] Most norms are indeed in need of interpretation. Even in the case of those whose text appears unambiguous, the question of their local and chronological applicability arises – are they binding for every person (belonging to the group addressed) in every place and at all times? This explains that, just as in other legal systems, more than one opinion will be upheld with regard to virtually every question. Consequently the interpreters' knowledge, previous understanding of the subject, orientation and methods are all the more important. Overall the essential potential of the development of Islamic law, and with it the key to understanding it, rests in the doctrine of the sources of the law and the instruments of deducing laws. It is not the individual results, which keep changing throughout history, but the journey towards them that guarantees authenticity – which will always be assessed anew – as well as the necessary flexibility without which every legal system will lose its acceptance.

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35 Cf. Muẓaffar, *Uṣūl al-fiqh*, vol. 2 (part 3), 53; Löschner, Die dogmatischen Quellen, 83.

36 Krawietz, Hierarchie, 2002. Her study does not focus on actual historical development but on the 'ideal system' of the doctrine of the legal sources and the instruments of deducing the law developed in Sunni Islam, found in traditionalist literature up to the present day.

37 Cf., once more, al-Shāfiʿī, Al-risāla, 26 ff. and *passim*; transl. in Khadduri, Risala, 71 ff.; in the context of the concept of *ribā* ('usury') see Ibn Rushd, Al-muqaddima, vol. 2, 179 f.

This is closely linked to the answer to the question of who is entitled to 48
interpret the respective norms. According to traditional opinion by no means everybody (*al-ʿāmmī*) is qualified to do this, but rather only someone who possesses sufficient religious steadfastness, integrity and knowledge (*mujtahid*).[38] The subject is usually discussed in context with the responsibilities of the mufti. A parallel development may be seen here, too, which tends to restrict freedom of action in favour of the uncritical adoption of expert opinions. Thus al-Āmidī discusses the question of whether someone who is not capable of *ijtihād* himself is obliged to follow the mujtahids' statements and opinions.[39] He answers in the affirmative without reservations, and at the same time dismisses the view of Muʿtazilite scholars who stated that the duty of adopting an opinion was dependent on an examination based on sufficient indication, consequently leaving more room for individual reflection. The author does allow more leeway at the level of the mujtahid: someone qualified for *ijtihād* must not simply adopt another mujtahid's opinion instead of his own reasoned results.[40]

2 The Quran

The first and most noble source of the law is without question[41] the Quran (*qurʾān*, the book to be recited frequently).[42] According to its own statement it commands and teaches justice[43] and allows assured decision.[44] The Quran is much more than a 'law book'; its greater part comprises not laws but statements on God and his prophet, articles of faith, religious commandments and prohibitions, edifying narratives, interpretations of the world, statements and instructions on historical events and about people of Muhammad's time, and much else. An estimated 500 verses are presumed to refer immediately to legal contents. These include the large proportion of rules for religious ritual (*ʿibādāt*),

38 Cf. only al-Āmidī, Iḥkām, vol. 3/4, 921 ff.; for his biography cf. Weiss, Al-Āmidī, 339 ff.

39 Op. cit., 975 f.

40 Op. cit., 955 ff.; also e.g. al-Nawāwī, Rawḍat al-ṭālibīn, vol. 8, 88.

41 Despite the vague transmission history there is extensive agreement between Sunnis and Shiʿites; cf. Löschner, Die dogmatischen Grundlagen, 72 and ff. with further references also concerning the divergent views of the Shiʿite Akhbārī party.

42 From among a wealth of literature on the subject of the Quran, cf. only the introductions by Hartmut Bobzin, Der Koran, 4th ed. 2001, esp. 18 ff. on the terminology, and by Michael Cook, The Koran, Oxford 2000.

43 Cf. e.g. sura 4:135; 5:8; 6:152; 7:29; 16:90; 40:9; 57:25.

44 Cf. e.g. sura 5:50.

while only a few dozen verses contain commandments regarding matters of civil or criminal law.[45] Legal questions are also answered indirectly, with reference to statements not originally concerned with legal matters, as e.g. the question of whether conclusions by analogy are permissible (see 5. below).

The Quran offers detailed legal rules for some areas, such as inheritance law, marriage and family law and a few penalty provisions (cf. 4.2.f below), and alms
49 tax. In some instances legal subject matter is indicated, but without specifying legal consequences of transgressions, such as in the case of extra-marital intercourse. A body of detailed exegetic literature (Ar. *tafsīr*, 'elucidation') developed over the centuries following the prophet's death. An important work of the early period is for instance the commentary by Abū Ja'far Muhammad ibn Jarīr al-Ṭabarī (d. 310/923).[46]

When dealing with Quranic legal norms, two main challenges arose from a juristic point of view. On the one hand simple problems of interpretation (*ta'wīl*) needed to be solved. As in every book of laws, the wording is virtually never so clear as to preclude any question of interpretation. This is just as true of a work which is seen as shaping the language even in the fifteenth century of the Hijra. Exegetes distinguish between clear verses which do not require interpretation (*muḥkam*) and those which do not possess this degree of clarity.[47] The latter are in the great majority. The Twelver Shi'ite minority of the Akhbārī ('traditionalists') even held the view, against that of the majority of the Uṣūlī ('rationalists'), that the Quranic text was so incomprehensible to the people after the occultation of the twelfth imam that no legal rules could be gleaned from it; its normative substance could only be unlocked by means of the tradition (sunna) of the imams.[48] Adherents of the dominant Uṣūlī party also presume that in these times it is only possible to approximate to a comprehension of the wording and that consequently the substance of statements is only 'probable'.[49]

Norms – including those of religiously based laws – always require interpretation with regard to their chronological, local and personal applicability. Thus some provisions relate only to the heathen Meccans who were at war with the

45 Hallaq, History, 3 f.; Löschner, Die dogmatischen Grundlagen, 75 with further references.

46 Jāmi' al-bayān 'an ta'wīl āyāt al-Qur'ān, called Tafsīr al-Ṭabarī.

47 Cf. Bobzin, Der Koran, 109 f.

48 Cf. Gleave, Inevitable Doubt, 249 and *passim* with further references; Löschner, Die dogmatischen Grundlagen, 76 ff.

49 Cf. Falaturi, Zwölfer-Schia, 85; Löschner, Die dogmatischen Grundlagen, 78. Regarding the different epistemological approaches of the two schools of thought cf. Gleave's study, Inevitable Doubt 2000.

new Muslim community, others only to the prophet's wives.[50] These examples show clearly how inappropriate it would be to read such norms purely literally and removed from their context, their interpretation and time.[51] The subject of interpretation will be discussed in some detail below (4.7.b.ff) using the example of the penalty for theft (sura 5, 38). In the present context, a few illustrations should suffice:

Suras 65:1 and 2:228 determine the time (*ʿidda*) a divorced woman has to wait before a possible remarriage. The time stipulated is 'three menstrual cycles'. However, the term *qurū'* is not entirely clear: it denotes the days of the actual menstruation (*ḥayḍa*) as well as the time in between (*ṭuhr*). Consequently the allotted time is calculated differently depending on whether Hanafites and Hanbalites (calculation beginning with the first *ḥayḍa*) are consulted, or 50
Malikites and Shafiʿites (calculation beginning with the first *ṭuhr*).[52]

Another example is the rule in sura 60:11, according to which in the case of women who have joined the believers from the unbelievers the dower paid had to be repaid. An early work of legal scholarship quotes ʿAṭā ibn Abī Rabāḥ's (late first/early second century AH) opinion on the subject: the verse quoted does not refer to women of the polytheists (from Mecca) in general, but only to those who had a part in the armistice treaty of al-Ḥudaybiya in the year 6/628[53] between Muslims and polytheistic Meccans.[54] This interpretation illustrates that from the earliest period onwards the exegetes referred to the causes of the revelation (*asbāb al-nuzūl*).[55] With the corresponding interpretation, some of these revelations are to be seen as entirely linked to a particular time. This is true also for instance in the case of fighting/killing the 'hypocrites' as ordered in

50 Cf. sura 33, 50.

51 This technique provides a point where some Muslim extremists, uneducated Muslim traditionalists and crude anti-Islamic propagandists meet – an ugly example of how some forms of extremism cross cultural borders, and of simple narrow-mindedness.

52 Cf. al-Zuḥaylī, Al-fiqh, vol. 1, 468; vol. 7, 630 ff.; al-Shāfiʿī, Al-risāla, 562 ff.; transl. in Khadduri, Risala, 334 ff. Al-Shāfiʿī cites this explicitly as an example of admissible disagreement in the interpretation (*ikhtilāf*).

53 Cf. Ibn Hishām, Al-sīra, vol. 3, 196 ff.; Pohl, Islam, 80.

54 Cf. Motzki, Anfänge, 100 with further references.

55 Cf. e.g. the comments on the relevant Quranic passage in al-Qurṭubī, Al-jāmiʿ, vol. 17, 59 ff.; for a general overview cf. Rippin, The Function, 1–20. Fundamental texts are al-Suyūṭī, Lubāb al-nuqūl fī asbāb al-nuzūl; al-Naysābūrī, Asbāb al-nuzūl. Hans-Thomas Tillschneider, Typen historisch-exegetischer Überlieferung, Formen, Funktionen und Genese des asbāb an-nuzūl-Materials, Würzburg 2011, presents an analysis of the textual material, written in a rather ponderous style but with a wealth of material.

sura 4:88 ff.[56] Andrew Rippin[57] has come to the conclusion that the information on certain causes of the revelation is often so diverse and flexible that the exegete would have reached a certain solution first by means of interpretation and afterwards underpinned it with information concerning the cause of the revelation.

The well-established prohibition of 'alcohol' is not unambiguous, either: while the Quran does forbid the consumption of *sharāb*[58]or *khamr*,[59] it is open to interpretation what exactly these two terms refer to. Thus there are statements claiming that only wine made from grapes is intended, or only (certain) other inebriating drinks. Later texts, however, include all inebriating drinks in this prohibition.[60] The interpretation of the rule stated in sura 2:280 may serve as a final example: it demands that a debtor in financial difficulties should be granted an extension of the payment time until he has found relief. In this instance the exegetic literature refers to an event concerning obligations to repay a sum of capital on the one hand and a corresponding interest payment on the other. Consequently some exegetes linked the commandment to grant respite to interest payments only. As the regulations on charging interest had already been revealed elsewhere, others did not find this at all convincing.[61]

Besides, questions of competition between verses of diverging contents had to be solved. There are a large number of such divergences, an example being
51 the gradual revelation of the prohibition of alcohol consumption in suras 16:67; 2:219; 4:43, and finally 5:90. At the end a nearly absolute prohibition was issued, which may be disregarded in genuine emergencies only. Another example is the time a widow must wait before a remarriage: the time of twelve months fixed in sura 2:240 is seen to be replaced by the time of four months and ten days set in sura 2:234.[62]

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56 Cf. al-Qurṭubī, Al-jāmiʿ, vol. 5, 308 ff.

57 The Function, 8.

58 Sura 16:67.

59 Sura 2:219; 5:90.

60 Cf. e.g. al-Qudūrī (362–428/973–1037), Al-tajrīd, 6079 ff.; ʿAbd al-Raḥmān al-Jazīrī, Al-fiqh, vol. 3, 6 f. Abū Ḥanīfa is said to have distinguished between the consumption of *khamr* and *nabīdh*: in the case of the former the *ḥadd* punishment must be carried out independent of whether inebriation resulted, while after consumption of the latter, inebriation was the condition of the punishment; cf. al-Māwardī, Al-aḥkām, 284.

61 Cf. al-Nakhkhās, Al-nāsikh wa-l-mansūkh, 83 f., against Shurayḥ's and Ibrāhīm al-Nakhaʿī's restrictive view quoted there.

62 Cf. Burton, Sources, 57 ff. with further references.

In order to resolve the question of competition the principle mentioned above would apply: The later regulation supersedes the earlier one. In technical terms, the earlier verse (*mansūkh*) is abrogated (*naskh*, abrogation) by the later one (*nāsikh*).[63] Dividing the suras into Meccan (up to the hijra in 622) and Medinan (after the hijra) gains in importance in this context. The fact that the edition of the Quran (which is accepted to this day) was prepared comparatively soon afterwards under the third caliph ʿUthmān allowed the editors to collect information on the time of the respective revelations from the surviving companions of the prophet. There is disagreement on whether the Quran and the prophetic tradition (sunna) may affect one another along the lines of abrogation. According to one view Quran may abrogate Quran as well as sunna, a second opinion holds that the Quran may abrogate only the Quran but not the sunna, while a third one affirms that the sunna may abrogate both Quran and sunna.[64]

Additional problems arise from the fact that when it comes to abrogation, *uṣūl* science distinguishes between the levels of the written text (*tilāwa*) on the one hand and the command implied in it (*ḥukm*) on the other. The abrogation by a passage formulated later of an earlier passage still found in the Quran (*naskh al-ḥukm dūna l-tilāwa*) is comparatively easy to comprehend – the earlier text is still present, but does not apply any more. However, another variant considered possible is that the text of a rule as well as the implied command may be abrogated and that consequently this rule would not have been included in the extant text of the Quran (*naskh al-tilāwa wa-l-ḥukm*). Later the further variant is added that only the text is abrogated but not its substance (*naskh al-tilāwa dūna l-ḥukm*). This is relevant in particular in the context of the punishment of stoning – which is not included in the Quranic text – for illegal sexual relationships of married people (*zinā*; cf. also 4.7.b.cc below): whoever considers this variant of *naskh* possible is able to base the punishment by stoning not only on (very controversial) prophetic traditions but also on the Quran itself.[65] Khārijites and Muʿtazilites, on the other hand, 52
rejected this penalty precisely because there is no Quranic basis for it.[66]

63 Instances of this are found as early as the turn of the second century of the hijra; cf. Motzki, Anfänge, 90, 102 ff. with further references; cf. also Powers, The Exegetical Genre, 119; Rippin, Al-Zuḥrī, 22 ff. In detail Burton, Sources 1990.

64 Cf. the even more, but not entirely consistent, overview in al-Nakhkhās (d. 338/949), Al-nāsikh wa-l-mansūkh, 10 f.; cf. also Burton, Sources 35 ff.

65 Regarding the relevant sources cf. Burton, Sources, 122 ff., esp. 134, 147; Souaiaia, The Function, 259. Other views in e.g. Diakho, La Lapidation, 59 ff., 148.

66 Burton, Sources, 148 f. with further references.

Finally the Quran serves as a basis for the argumentation of further legal sources and instruments of deducing laws in *uṣūl* science. Where adherence to formal rules would lead to unsuitable results it is possible to refer to the oft-repeated statement that God wants to bring relief rather than making things more difficult for humans, as after all humans were created weak.[67]

3 The Sunna of the Prophet

The second legal source whose significance is largely uncontested is the so-called sunna of the prophet Muhammad. It is the basis for, e.g., the law of evidence (cf. 1.5 above),[68] according to which the plaintiff must bring proof of his claims; the defendant must confirm his denial by oath (at the plaintiff's request).

The concept of sunna is, however, remarkably multi-faceted. It denotes approximately the established practice which is considered right. It is important to bear in mind that during the formative period of the Sunnites and even afterwards, especially in the Malikite school, 'sunna' referred to not only the prophet Muhammad's traditions but also the practice of the prophet's companions and the practice of the community in Medina.[69] These are the basis for regulations of the husband's one-sided right to divorce (*ṭalāq*) and the specific divorce law for wives (*khulʿ*, cf. 4.2.b.gg below), absence of criminal responsibility in the case of (Quranic) theft by persons of under six spans tall, freedom from punishment for the killing of a rapist, non-applicability of Quranic laws on theft to non-Muslims and equal blood-money to be paid for Muslim and non-Muslim victims of wilful homicide.[70]

Scholarship contains a wealth of conjecture on whether the actual daily practice of the early period might be in conflict with the traditions of the prophet's words and deeds (Ar. *aḥādīth*, sg. *ḥadīth*, Turk. *hadis*, 'tradition')

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67 Cf. e.g. sura 2:185; 4:27 f.; 65:4, 7.

68 *Al-bayyina ʿalā l-muddaʿīn wa-l-yamīn ʿalā man ankara*, cf. al-Bukhārī, Ṣaḥīḥ, vol. 3, 116; al-Māwardī, Al-aḥkām, 91; al-Qayrawānī, Al-risāla, 260; in detail in al-Shāfiʿī, Kitāb al-umm, vol. 7, 17 ff.

69 Cf. Saʿīd Abū Jīb, Aḥmad ibn Ḥanbal, 91 and ff. with further references, Krawietz, Hierarchie, 63 with further references. Shiʿites express objections, e.g. Ḥasan al-Amīn, Dāʾira, vol. 11, 256.

70 Cf. corresponding traditions in Zakariyya ibn Bulām Qādis al-Bākistānī, Mā ṣaḥḥa min āthār al-ṣaḥāb fī l-fiqh, vol. 3, 1043, 1232, 1238, 1245, 1271.

which were only systematically collected and promulgated rather later.[71] The debates between *ahl al-raʾy* and *ahl al-ḥadīth* mentioned above can give us some starting points in this context. Once scholarly works on the doctrine of legal sources began to appear, the term developed clearer contours which it retains to this day. Since that time the sunna is usually understood as the entirety of the authentic traditions of the prophet Muhammad's words and 53
deeds insofar as they are based on his prophethood rather than on his purely human quality. There are several hadiths in relation with clearly wrong instructions on cultivating dates which point to this aspect: 'I (sc.: Muhammad) am (only) human; if I instruct you in religious matters, accept my instruction, but if I instruct you according to my own deliberation (*raʾy*), then I am a (fallible) human',[72] and 'In your worldly affairs you are more knowledgeable (than I)'.[73] In this context a modern author[74] points out that the Quran reprimands even Muhammad if he errs, but that later scholars as indeed all followers of organised religions found it difficult to distinguish between the man and the prophet with regard to authority and reliability.

To Sunnis the term sunna often includes the confirmatory practice of Muhammad's companions (*ṣaḥāba*) and successors (the first four 'rightly guided' caliphs, Ar. *al-khulafāʾ al-rāshidūn*). Among the Twelver Shiʿites the opinion prevails that besides the prophetic traditions the normative practice of the 'infallible' twelve imams as the successors of the prophet had to be included in the sunna; some also include Muhammad's daughter Fāṭima, the wife of the caliph ʿAlī.[75] Referring to traditions which go back to the, in their view, 'false' first three caliphs, on the other hand, is rejected by the Shiʿa.[76]

In the by now accepted self-referential argumentation, the legitimation of the sunna as a source of the law is inferred from various Quranic verses.[77]

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71 Cf. only Goldziher, Muhammedanische Studien, part 2, 11 f.; Schacht, Origins, 58.

72 *Innamā anā basharun idhā amartukum bi-shayʾin min dīnikum fa-khudhū bihi wa idhā amartukum bi-shayʾin min rayʾin fa-innamā anā bashar*, transmitted by Muslim, Ṣaḥīḥ, vol. 2, 1011 (no. 6276).

73 *Antum aʿlamu bi-amri dunyākum*, transmitted by Muslim, Ṣaḥīḥ, vol. 2, 1011 (no. 6277), a comparable tradition is in Ibn Majā, Sunan, Thesaurus Islamicus Foundation edition 2000, 358 (no. 2565).

74 Souaiaia, The Function, 343 f.

75 Cf. Löschner, Die dogmatischen Grundlagen, 86 f. with further references.

76 Cf. Ḥasan al-Amīn, Dāʾira, vol. 11, 248 ff., 255 ff.; cf. also Stewart, Islamic Legal Orthodoxy, 243 with further references.

77 Cf. e.g. sura 7:157: the prophet commands what is right and forbids what is evil; sura 33:21: exemplary character of the prophet Muhammad; suras 3:32, 132; 4:59; 5:92; 8:1, 20, 46; 24:54,

The sunna's particular significance lies in the fact that many points of law are not addressed or settled explicitly. On the other hand, after the death of the last prophet (*khātam al-anbiyyā'*, 'seal of the prophets') Muhammad, direct access to solutions via revelations was barred. It is likely that during the first century of the hijra independent reasoning (*ra'y*, opinion) was the most widely used means of deducing laws, even though some traditions of the prophet and his companions were consulted as well. From the second century of the hijra onwards people increasingly began to wish for verdicts based on a more secure religious foundation. The fact that the 'exemplary' prophet's companions and those who had received direct information from them had passed away by that time may have played a part in this development. Consequently the traditions of the prophet's words and deeds were gradually collected and compiled. By
54 the end of the third/ninth century the groundwork of Sunni *'ilm al-ḥadīth* (hadith science) had been completed to a great extent.[78] At the same time Sunni Islam saw a distinct rapprochement between the positions of extreme adherence to traditions on the one hand, as typical of Ẓāhirites and Hanbalites and their predecessors, and extensive independent reasoning of other scholars and schools on the other.[79]

The standard collections used by the Sunnis to this day are the 'six books' by Bukhārī,[80] Muslim,[81] Abū Dāwūd,[82] Ibn Māja,[83] Tirmidhī[84] and Nasā'ī,[85] as well as the collections by Dārimī[86] and by Bayhaqī[87] and Aḥmad ibn Ḥanbal's *Musnad*.[88] The great majority of traditions goes back to the prophet's companions 'Abd Allāh ibn 'Umar, 'Alī ibn Abī Ṭālib, Anas ibn Mālik, Abū Hurayra, Ibn 'Abbās, Ibn Mas'ūd, 'Umar ibn al-Khaṭṭāb and 'Uthmān, while other companions are only occasionally mentioned as the source. The majority of them lived in the centres Kufa, Basra, Medina and Mecca.[89] The Ibāḍīs also contributed

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56; 33:33, 66, 71; 64:12; 67:33; 68:13: the command to obey God and his messenger. Cf. also suras 8:13, 27; 14:44; 26:216; 60:12.

78 On its genesis cf. Motzki, Anfänge, 37 ff. with further references.

79 Cf. Melchert, Formation, 198 f. and *passim*.

80 Muḥammad ibn Ismā'īl al-Bukhārī (194–256/810–870), Kitāb al-jāmi' al-ṣaḥīḥ.

81 Muslim ibn al-Ḥajjāj al-Qushayrī (204–261/820–875), Ṣaḥīḥ.

82 Abū Dāwūd Sulaymān ibn al-Ashath (202–275/817–889), Sunan al-muṣṭafā.

83 Abū 'Abdallāh Muḥammad ibn Yazīd (209–273/824–886), Sunan.

84 Al-Tirmidhī, Abū 'Īsā Muḥammad ibn 'Īsā (209–273/824–886), Sunan.

85 Abū 'Abdarraḥmān Aḥmad ibn Shu'ayb al-Nasā'ī (215–303/830–915), Al-sunan.

86 Abū Muḥammad 'Abdallāh ibn 'Abdarraḥmān al-Dārimī (181–255/797–869), Sunan.

87 Abū Bakr Aḥmad ibn al-Husayn (384–458/994–1065), Al-sunan al-kubrā.

88 Aḥmad ibn Ḥanbal (164–241/781–856), Musnad.

89 Hallaq, Origins.

considerably to hadith collections.[90] Among the Shiʿites, the relevant 'four books' composed in the tenth and eleventh centuries enjoy particular esteem, namely the works *Al-kāfī fī ʿilm al-dīn* by al-Kulaynī,[91] *Man lā yaḥḍuruhu l-faqīh* by his pupil Ibn Bābawayh (Bābōye) al-Qummī,[92] and *Tahdhīb al-aḥkām* and *Al-istibṣār fī mā ukhtulifa fīhi min al akhbār* by Abū Muḥammad Jaʿfar ibn al-Ḥasan al-Ṭūsī[93] ('al-Shaykh al-Ṭūsī').[94]

The challenge arising was not only to collate, if possible, all traditions, but also how to address the problem of verification. Referring to an alleged prophetic tradition might have far-reaching consequences for both legal policy and power politics. The danger of falsification was consequently great.[95] There are indeed specific lists of famous falsifiers of hadiths.[96] According to texts on establishing authenticity, even respected scholars such as Qatāda ibn Diʿāma, Ḥasan al-Baṣrī or Ḥabīb ibn Abī Thābit are said to have circulated falsified hadiths.[97] Hadith science sought to evade this difficulty by prefacing every single tradition with a chain of the authorities (*isnād*)[98] who had reported the respective contents (*matn*). The *isnād*, supported by wide-ranging genealogical knowledge, served to verify or falsify the authenticity of the respective tradition.

Thus a scale of 'degrees of rank' was evolved for the authenticity of traditions, based on the number and structure of the chains of transmitters as well as on the trustworthiness of the individual authorities. There are clear differences between Sunnis and Shiʿites.[99] The Shiʿa did not consider those prophet's companions reliable authorities who had supported the appointment of those caliphs who were not legitimate according to Shiʿite opinion. Shiʿite imams, on 55

90 Cf. the references in Nami, Studies, 66 ff.

91 D. ca. 329/941; modern edition in Mawsūʿat al-kutub al-arbaʿa, ed. by Muḥammad Jaʿfar Shams al-Dīn, 8 vols., Beirut 1413–1419/1992–1998.

92 D. ca. 381/991; modern edition by Muḥammad Jarār al-Faqīh, 4 vols., Beirut 1415/1992.

93 D. 460/1067; modern edition of Ahdhīb al-aḥkām by Muḥammad Jaʿfar Shams al-Dīn, 10 vols. in five books, Beirut 1412/1992; modern edition of *Al-istibṣār fī mā ukhtulifa fīhi min al akhbār* by Ḥasan al-Mūsawī al-Khurāsān, 3 vols., 2nd ed. Najaf 1375–1376/1956–1957.

94 Cf. Löschner, Die dogmatischen Grundlagen, 93.

95 Cf. e.g. Hallaq, Origins, 73 f. with further references; Charfi, L'islam, 192 ff. is very critical regarding reliability and the traditionally strong position in comparison with the Quran.

96 Cf. al-Sarītī, Taʾrīkh, 89 f.; Krawietz, Hierarchie, 49 ff.

97 References in Hallaq, Origins, 74 with n. 66; cf. also EI II, vol. 2, art. 'D̲Jābir b. Zayd (on al-Ḥasan al-Baṣrī), 359 f.

98 On its genesis cf. Motzki, Anfänge, 25 ff., with a plausible refutation of Schacht's assumption that the use of *isnād* only came up during the second century of the hijra.

99 Cf. Coulson, History, 105.

the other hand, were of particular importance in this field.[100] This is the reason why Sunni and Shiʿite inheritance law developed in clearly different ways (cf. also 4.3 below).

Within Sunni law, three rough 'quality grades' of traditions have developed. The most trustworthy tradition is *sunna mutawātira*, traced back to a great number of prophet's companions and transmitted without interruptions via numerous chains of transmitters.[101] In later times among the Sunnis this 'grade' would also include those frequently occurring traditions which differ in the wording but not the substance (*maʿnā*) of the statement.[102] *Sunna mashhūra*, which goes back to only one or few prophet's companions but was then transmitted via a great number of chains of transmitters, is weaker;[103] the weakest grade is *sunnat al-āḥād* or *khabar al-wāḥid*. It neither goes back to a great number of prophet's companions, nor is it based on a great number of chains of transmitters. In extreme cases it shows only one transmitter per generation. This grade includes the majority of hadiths,[104] and their status is a matter of controversy within and between the schools.[105]

In some instances argumentation can be rather cavalier: in al-Marghīnānī's famous *Hidāya*, the chapter concerning the alimony payable to an irrefutably divorced wife includes diverging opinions on whether the former husband must pay alimony to her during the waiting period (*ʿidda*) stipulated before a possible remarriage. Al-Marghīnānī[106] refers to a prophetic tradition which goes back to Fāṭima bint Qays, in which Muhammad answered this question in the negative. Al-Marghīnānī adds that this tradition was later rejected by ʿUmar (the second caliph) remarking that the Quran and the prophet's sunna would most certainly not be set aside in favour of the statement of a woman of whom it was impossible to be sure whether she was speaking the truth or lying, whether she remembered correctly or had actually forgotten the tradition. There then follows a tradition to the contrary, transmitted by ʿUmar himself, together with a reminder that other authorities such as Zayd ibn Thābit, Usāma ibn Zayd, Jābir and ʿĀʾisha rejected the former version.

There were conflicting views on the question of whether the authenticity of a tradition required to be applied in practice at the same time, and consequently

100 Cf. e.g. Ḥasan al-Amīn, Dāʾira, vol. 11, 251 ff.

101 Cf. Salqīnī, Al-muyassar, 75; al-Āmidī, Iḥkām, vol. 2, 252 ff.

102 Cf. Hallaq, Sharīʿa, 95.

103 Salqīnī, Al-muyassar, 76.

104 Op. cit., 76 f.; cf. also Hallaq, Sharīʿa, 94 f.

105 Cf. Melchert, Formation, 179 f., 199; Ahmed, Narratives, 73 ff.

106 Al-hidāya, vol. 2, 290.

whether a tradition along the channels of hadith was superfluous. Scholars from Medina in particular, and the Malikite school succeeding them, inclined – unlike the other great schools of law – to this opinion and emphasised the sig- 56
nificance of Medinian practice (*ʿamal ahl al-Madīna*).[107] The majority, however, increasingly equated prophetic tradition (*sunna*) and the corresponding textual tradition (*hadith*).

Boundaries had to be drawn with regard to contents as well: The prophet's words and deeds were limited to his individual practical situation in and knowledge of the world and could not be – and his own words to that effect are transmitted – used as a source of the law. There were also attempts, especially among Muʿtazilites and Hanafites, to investigate not only the chain of transmitters but also to examine the contents of the tradition, as they did not see the 'technical' examination alone as being able to exclude all danger of falsifications.[108] To this day, however, these approaches have not been able to prevail to any significant degree as an independent method in Muslim *uṣūl* literature, while some elements (content-based criteria for identifying a forged hadith[109]) have been implemented into later Sunni doctrine.[110] This is not surprising as after all the most vehement supporters of this opinion were the rationalists of the Muʿtazila, who would later be widely rejected.[111]

As *naṣṣ* ('text', pl. *nuṣūṣ*), the Quran and the sunna enjoy the highest esteem of the sources of law. There is not, however, agreement on whether the Quran is higher than the sunna throughout. This is relevant on the one hand with reference to the question of whether there can be abrogation (*naskh*) in the relation between later sunna and earlier revelation in the Quran. Supporters of this kind

107 Cf. Saḥnūn, Al-mudawwana, vol. 1, 61 ff. (for his biography cf. Brockopp, Saḥnūn, 65 ff.); al-Yaḥṣūbī, Tartīb al-madārik, vol. 1, 19 ff., 22 ff.; Dutton, Original Islam, 17 and *passim* with translated source references from Muḥammad ibn Muḥammad al-Rāʿī's (782–853/1380–1449) *Intiṣār al-faqīr al-sālik li-tarjīḥ madhhab al-imām al-kabīr Mālik*, 69 ff.

108 Cf. Ibn Qutayba, Kitāb taʾwīl mukhtalif al-ḥadīth, 188 ff., 206 ff.; Burton, Sources, 149; other textual instances by authors of the third and fourth/ninth and tenth centuries are found in J. A. C. Brown, How We Know, 154 ff.; id., The Rules, 356 ff. with further references; Karčić, Über die Methode, 40 ff. Some signs are also present in the Hanbalite Ibn ʿAqīl's Al-wāḍiḥ, vol. 3, 77 ff.

109 J. A. C. Brown (The Rules, 362) refers to the work of al-Khaṭīb al-Baghdādī (d. 463/1071) containing criteria such as reports which reason rejects as impossible, which contradict e.g. the Quran or the widely transmitted sunna, or which recount events so momentous that if the report were true, it would have been transmitted more widely.

110 Cf. J. A. C. Brown, How We Know, 150 ff.; id., The Rules, 359.

111 Cf. J. A. C. Brown, How We Know, esp. 167 ff.

of abrogation put forward the argument that both have their origin with God.[112] Opponents argue that the sunna is only a supplement to the revelation, but that God did not authorise his prophet to change his commandments.[113] However, the sunna might be adduced to help clarify questions of abrogation within the Quran.[114] According to al-Shāfiʿī, this 'clarifying' function goes very far: at first (4:15 ff.) Quranic revelations regarding the punishment for unlawful sexual intercourse stipulate imprisonment until death unless 'God appoints for them a way', or chastisement. These regulations are abrogated by sura 24:10: a hundred lashes. The sunna then states this 'more precisely', namely that only unmarried offenders were to be punished with lashes, while married culprits were to be stoned according to the sunna (nowadays controversial, cf. Part 2, 3.4.a below).[115] Similarly, sunna and consensus (*ijmāʿ*) arrive at the interpretation of Quranic inheritance law provisions (sura 2:180 – commands that a will should be made in favour of parents and closest relatives, and sura 2:240 – commands to provide for surviving wives) that a will in favour of an heir is unlawful,[116] which is not at all indicated by the Quranic text.

57 On the other hand there is the question whether a later revelation can abrogate an earlier sunna. Al-Shāfiʿī's argumentation may provide an instance:[117] The prophet formulated norms only at God's command. If an earlier sunna were to be abrogated by a later revelation, a corresponding new sunna would have to be formulated. Abrogation, he says, can only exist between norms that are of the same rank and only in the explicit form of an old rule being replaced by a new one. Otherwise one would have to assume that the entire sunna could be put into doubt by (later) revelations. This would, for instance, lead to the prerequisites for establishing the elements of the offence of theft (*sariqa*; cf. sura 5:38 and IV 7.b.ff below), namely the minimum value of the stolen goods and breach of safekeeping, which are based on the sunna, not applying anymore due to the general wording of the concept 'theft'; al-Shāfiʿī clearly considers this unacceptable. Al-Sarakhsī[118] on the other hand states quite drily

112 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 124, with examples; al-Āmidī, Al-iḥkām, vol. 2, 520 ff.

113 Cf. al-Shāfiʿī, Al-risāla, 106 (sunna merely supplementary), transl. in Khadduri, 123 f.; cf. also Mahmassani, Falsafat, 64 ff.

114 Al-Shāfiʿī, Al-risāla, 115 f.

115 Op. cit., 129 ff., transl. in Khadduri, 137 ff.

116 Op. cit., 137 ff., transl. in Khadduri, 141 ff. Regarding the divergent opinions cf. e.g. Shahbūn, Al-shāfī, vol. 2, 133 ff. (with reference to Art. 280 of the Moroccan *mudawwana*); Souaiaia, The Function, 55 ff. and *passim*.

117 Al-risāla, 106 ff., transl. in Khadduri, 123 ff.

118 Kitāb al-mabsūṭ, vol. 16, 85.

that his (Hanafite) school considers the abrogation of sunna by Quran permissible; his instance is the Quranic alteration of the direction of prayer from that practised by Muhammad – facing towards Jerusalem (Bayt al-maqdis) – to Mecca.

Thus a considerable degree of uncertainty remains with regard to the sunna as a source of the law; at the same time, however, there is considerable choice, described by a modern standard work on Islamic law in the following way: 'Of these teachings (the hadiths) despite the monumental labours of the traditionists,[119] we have no authentic record, for, on closer examination the well-known traditions in the authoritative collections appear to have "grown" later, in the second or third century A.H., and we cannot say for certain whether they represent the prophet's actual words and actions. Modern research tends to show that a major portion of the traditions attributed to the prophet is apocryphal. (…) The hadith may thus be one of two things: (i) a reform advocated by the prophet in opposition to the prevalent usage, or (ii) a practice put forward by certain jurists to support their own theoretical opinion or the prevalent usage of a particular community.'[120]

The sources of the law and instruments of deducing laws to be presented in the following have all been arrived at by juristic reasoning, even though their roots are to be found in the Quran and the sunna. Their foundations and their status within the structure of the doctrine of the sources of the law were disputed in many respects over time. Scholars who were primarily oriented towards prophetic tradition refused to accept further sources or rules of interpretation on a more theoretical juristic level, generally limiting themselves to the study of the traditions themselves. A specific school adhering to this opinion did not develop.[121] While the comparatively small Hanbalite school that is most closely related to this opinion has developed its own system of juristic dogma, it still fits into the framework of the other schools of law, notwithstanding numerous divergences on a more detailed level. Conversely the status accorded prophetic traditions in the other schools has risen to such a degree has risen that no fundamental tensions occur any more.

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119 He means the transmitters of hadiths.

120 Fyzee, Outlines, 25, 27.

121 Cf. Melchert, Formation, 13 ff., esp. 22 ff.

4 The Consensus of the Legal Scholars (*ijmāʿ*)

Ijmāʿ, the consensus of all the relevant scholars in accordance with the Quran and the sunna, is the third source of the law that is nearly universally accepted.[122] It is supported by the Quran,[123] by hadith,[124] and by the practice of the prophet's companions, e.g. in the case of the agreement on the appointment of the caliph after Muhammad's death.[125] However, this example illustrates the problems of *ijmāʿ*: from the Shiʿite perspective there was no agreement at all, as in their view the 'only true' caliph would have been ʿAlī (cf. 1. above), who was not appointed.[126] Thus the Shiʿites arrived at their own version of consensus, which must above all not go against the opinion of the infallible imam.[127] In other words, in their view the simply human accord is not sufficient, making it rather more difficult to agree on a consensus.[128]

The preconditions for an *ijmāʿ* were increasingly restricted during the formative period of Islamic law. While the scholars of Iraq or the Hijaz would at first be satisfied with the local or regional consensus, later, e.g. in al-Shāfiʿī's view,[129] only the agreement of all Muslims – subsequently specified as the relevant scholars[130] – would suffice.[131]

Structural differences between Sunnis and Shiʿites remained. The Shiʿites were accused (from the Sunni perspective) of deviating from the consensus, the gravity of the accusation occasionally approaching that of heresy or even apostasy.[132] An example in this context is the Shiʿite concept of temporary

122 Cf. al-Shāfiʿī, Al-risāla, 47 ff., transl. in Khadduri, 285 ff.; al-Ghazālī, Al-mustaṣfā, vol. 1, 173 ff.; Hasan, The Doctrine of Ijmaʿ in Islam, Islamabad 1976; Kamali, Principles, 168 ff.

123 E.g. sura 3:110 and 159; 4:115; 37:37; regarding Shiʿite criticism of basing the concept on the Quran cf. Löschner, Die dogmatischen Grundlagen, 17 ff.

124 E.g. 'My congregation does not agree on errors' (*la tajtamiʿu ummatī ʿalā ḍalāla*), Ibn Maja, Sunan, 464.

125 Thus al-Sarakhsī, Uṣūl, vol. 1, 301; cf. al-Mawdūdī, Tadwīn, 46.

126 Cf. Scheich al-Mufid, Kitab al-Irschad, 19 and *passim*; al-Muẓaffar, Uṣūl, vol. 2, 99 ff.; Halm, Der schiitische Islam, 15 ff. Concerning Shiʿite consensus theory cf. Löschner, Die dogmatischen Grundlagen, 131 ff.; cf. also Coulson, A History, 107 f.

127 Cf. Stewart's extensive study, Islamic Legal Orthodoxy, esp. 111 ff. with numerous source references, and Halm, Der schiitische Islam, 112 f.

128 Cf. the overview in Zacharias, Islamisches Recht, 146 ff.; 101 f. with further references.

129 Al-risāla, 475 f.; transl. in Khadduri, 285 ff.

130 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 181 f.

131 Khadduri, Risala, 32; cf. also al-Ghazālī, Al-mustaṣfā, vol. 1, 181 ff.

132 Stewart, Islamic Legal Orthodoxy, 50 f.; 54 ff.

marriage for a set, longer or shorter, time (so-called *mutʿa*[133]). Shaykh al-Mufīd (d. 413/1022), one of the earliest prominent Shiʿite authors, already debated 59
this in his *Al-masāʾil al-ṣaghāniyya fī l-radd ʿalā Abī Ḥanīfa*.[134] These issues illustrate that to begin with the Shiʿites generally followed Sunni sources and then defined themselves by dissociating themselves from the Sunni doctrines formulated earlier.

On the whole, hardly any area of the Islamic law is more debated than the method of arriving at and effectiveness of *ijmāʿ*. Benjamin Jokisch[135] puts it aptly: 'There is no *ijmāʿ* about *ijmāʿ*'. It is unclear who must be party to a decision by consensus, how the decision is arrived at in a concrete situation, and whether the consensus is binding for future scholars as well. There is probably agreement on the fact that consensus decisions by the prophet's companions (*ṣaḥāba*) who are recognised authorities are and remain binding. Until the fifth/eleventh century the majority (opinion) developed towards granting all later consensus decisions binding character as well. The answers to the multitude of decided issues must consequently be adopted without criticism (*taqlīd*).[136] Support for this view is found in sura 4:115 as well as in the prophetic tradition which legitimises *ijmāʿ* generally. The well-nigh insoluble question of how to determine the group of the relevant scholars was usually ignored. However, according to the opinion of the majority, the consensus of only the scholars of Medina – a place of particular learning in the early period – would not be sufficient.[137]

The more the number of actual or alleged consensus decisions grew, the less room there was for independent individual reasoning (*ijtihād*), especially if the decisions were considered to be binding even beyond the death of the parties to the consensus. In principle all those rules which are not entirely clear (*dalīl qaṭʿī*)[138] and consequently require interpretation (*dalīl ẓannī*) are open to *ijtihād*, and in this sense these are the great majority. According to al-Ghazālī, counter-examples instancing clear rules are the instructions for

133 Cf. Gourji, Temporary Marriage, 27 ff.; Sindawi, Temporary Marriage, 42 ff.

134 Najaf, n. d.

135 Ijtihad, 119, 126; cf. e.g. al-Āmidī, Iḥkām, vol. 1, 161 ff.

136 Cf. only the article headed *taqlīd* in Wizārat al-awqāf, Al-mawsūʿa, vol. 13, 154 ff.

137 Al-Shāfiʿī, Al-risāla, 533 ff., 535; al-Ghazālī, Al-mustaṣfā, vol. 1, 187; critical: Malikite literature, cf. e.g. Muḥammad ibn Muḥammad al-Rāʿī's (782/1380–852/1449) work *Intiṣār al-faqīr al-sālik li-tarjīḥ madhhab al-imām al-kabīr Mālik*, transl. by Dutton, Original Islam, 77 ff. On differentiating positions cf. also Lucas, Legal Principles, 289, 302 with further references.

138 al-Ghazālī, Al-mustaṣfā, vol. 2, 354.

the five daily prayers and the alms tax *zakāt*.[139] The doctrine of 'closing the gate to *ijtihād*' (*insidād* or *ighlāq bāb al-ijtihād*) was, however, already hinted at by al-Shāfiʿī.[140] By the fourth/tenth century the development to the extensive adoption of existing legal opinions (*taqlīd*) had essentially been completed.

Still, this doctrine was not undisputed during the classical period, either. A significant opponent was the very influential Ibn Taymiyya (661–728/1263–1328) who, like his pupil Ibn Qayyim al-Jawziyya (691–751/1292–1350), recog-
60 nised as binding only the consensus of the prophet's companions.[141] This opinion was already attributed to the founders of law schools Mālik ibn Anas[142] and Aḥmad ibn Ḥanbal and also supported by the founder of another school, Dāwūd al-Ẓāhirī.[143] In this context Ibn Taymiyya also quotes Abū Ḥanīfa's change of mind with regard to the legal form of a company *muzāraʿa* (more on which 4.5 below), which he had at first declared to be forbidden, but later decided – like his pupils – was permitted, because people simply did not adhere to his first opinion (forbidding it).[144] Shiʿites and others also recognise only this close consensus.[145] The modern opinion, which reopens the gate to *ijtihād* once more (cf. Part 2, 2.4.b below), ties in with this view; according to recent research, the gate had never really been entirely closed after all.[146]

It is, however, possible to observe that Sunnis in general have come to adhere more closely to the opinion of a school over a long time, and the scope for putting independent emphasis on issues has grown smaller in the face of the increasing abundance of literature. It is not by chance that the widely held – albeit supported far from convincingly by the sources in all its severity[147] – topos of the closing of the gate to *ijtihād* has become pretty much common property among contemporary Muslim scholars. They avail themselves of it in order to explain the rigidity of Islamic jurisprudence, for whose rejuvenation they strive by means of new *ijtihād*, with the aim of rendering it more up

139 Op. cit.

140 Al-Shāfiʿī, Al-risāla, 487 ff., transl. in Khadduri, 295 ff.; cf. also Khadduri, ibid., 43.

141 Cf. Ibn Abī Yaʿlā, Ṭabaqāt, vol. 2, 304; from Ibn Taymiyya's Fatāwā, vol. 30, 80; vol. 35, 380 ff.; for concrete instances cf. Jokisch, Ijtihad, 119, 125 f. with further references.

142 Krawietz, Hierarchie, 64 with further references.

143 Cf. Ibn Abī Yaʿlā, Ṭabaqāt, vol. 2, 304; Melchert, Formation, 180 with further references.

144 Ibn Taymiyya, Majmūʿ Fatāwā, vol. 30, 81; cf. also id., op. cit., vol. 35, 383 ff.

145 Quoted by al-Ghazālī, Al-mustaṣfā, vol. 1, 189, who objects to it.

146 Explicitly Hallaq, Was the gate of Ijtihad closed? in id., Law, ch. v; cf. also Melchert, Formation, 16 ff.; Haykel, Revival, esp. 81 ff., 96 ff.

147 As an instance cf. the discussion in Ibn Khaldūn, Al-muqaddima, 448; rightly critical e.g. Krawietz, Hierarchie, 419 f.; Poya, Iǧtihād, esp. 230 ff.

to date.[148] Thus Asaf Fyzee simply speaks of a long period of general decay.[149] Abdelmajid Charfi writes pointedly: 'The gravest consequence of the fuqaha's activities is that the Muslims have ceased to consult the Quranic text directly and consequently allowed secondary texts to occupy the first rank which claim to be drawing their insights from them (the primary sources) while they (the secondary texts) are in fact an obstacle to understanding and personal reflection which should take place without supervision and quite freely. Similarly the image of the prophet has been painted in idealised hues, raising him above the average mortal to the level of angels and mythical heroes, and the founders of schools have also become infallible or quasi-infallible in the Islamic perspective. Nobody dared criticise their ideas or observe the fact that these arose from the historical context which inevitably shaped them.'[150]

This corresponds to the observation that once the schools of law had been established, the originality of legal texts did indeed decrease noticeably: works from the fifth/eleventh century onwards – some of them opulent ones – discuss an abundance of individual questions and reflect the opinions of earlier scholars in great detail.[151] We would look in vain, however, for new conceptions or intellectual approaches to fundamental questions within legal texts in the traditional mould. Thus there are complaints about the near-complete absence of functional constitutional law and land law.[152] In the Shiʿa, on the other hand, greater scope of individual reasoning remained, based on the maxim attributed to ʿAllāmat al-Ḥillī, also found in ʿAlī al-Karakī (d. 940/1534), according to which a dead man's opinion should not be followed.[153]

61

If one assumes later consensus decisions to be binding as well, one would also have to address the virtually unsolvable task of determining the group of those who are entitled to cooperate on the consensus. This is closely linked to the question of how a consensus of all the relevant scholars between Fes and

148 Cf. Yūsuf al-Qaraḍāwī, Al-ijtihād al-muʿāṣir, 9; Kamali, Divorce, 85, 98 f.; Moinuddin Ahmed, The Urgency, 10 ff., 31 ff., 65 ff., 111 ff.; Lamchichi, Jihad, 47; Krawietz, Hierarchie, 70 ff. with further references.

149 Fyzee, Outlines, 36 and ff.

150 Charfi, L'Islam, 168.

151 Melchert's list (Formation, 60 ff.) of 62 commentaries on the two works by the early Hanafite jurist al-Shaybānī (*Al-jāmiʿ al-ṣaghīr* and *Al-jāmʿ al-kabīr*) from the four centuries after his death furnishes a clear example.

152 Charfi, L'Islam, 168 ff.

153 *Lā qawla li-l-mayyit*, 'a dead man has nothing to say'; cf. Halm, Der schiitische Islam, 119; Schneider, Iftā' in der Schia, 78.

Bukhara could have been agreed in actual fact at all. A consensus thus declared unequivocally (*ijmāʿ ṣarīḥ*) is likely to have been the exception.

Some look to a 'solution based on objection': silence with respect to a particular known process of decision-making is interpreted as assent (*ijmāʿ sukūtī*).[154] Knowledge of the subject of the decision is, however, a condition, and consequently the problem would not be significantly closer to being solved. Some schools of law, such as the Shafiʿites, reject this kind of *ijmāʿ* on principle:[155] silence does not necessarily express assent but might also be an expression of respect (for the one who 'errs') or fear.[156] One example of how these considerations apply to the present day is the problem of whether the time of government may be limited (e.g. to the term in office of a parliament). Yūsuf al-Qaraḍāwī remarked that while there is *ijmāʿ* stating that a ruler might rule for life, there was never any discussion of or research into the question of a time limit for his rule. This complete silence leaves the solution wide open.[157]

The situation is similarly uncertain in the case of the so-called implicit consensus (*ijmāʿ ḍimnī*) which assumes that a certain legal question was the subject of controversial debate among scholars. In spite of divergent opinions the implicit consensus is then called upon to exclude all those views which disagree with all the presented opinions while not having been presented themselves.[158] One example is the entitlement to inherit of the grandfather of the deceased besides his brothers. In the view of the prophet's companions Abū Bakr, Ibn ʿAbbās and ʿUmar, the grandfather should be the sole heir, while ʿAlī and Zayd ibn Thābit were of the opinion that he could only be an heir together with the brothers. As a consequence only the brothers being the heirs would not be possible.

62 Overall there is much uncertainty. Thus occasionally we read in one legal text that there is consensus regarding the solution discussed (*mujmaʿ ʿalayhi*), while the next book states that there is disagreement on the subject (*mukhtalaf fīhi*). An instance is the determination of the penalty for the consumption of alcohol, which is not defined either in the Quran or the sunna (40 or 80 lashes;

154 This is an approximate reflection of the attitude of Hanbalites such as Ibn Taymiyya and Ibn Qayyim al-Jawziyya; cf. Jokisch, Ijtihad, 126 with further references, also concerning divergent opinions.

155 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 191 f.

156 Cf. Salqīnī, Al-muyassar, 96 f.

157 Al-Qaradawi, Priorities, 158.

158 Cf. Salqīnī, Al-muyassar, 110 ff.

cf. 4.7.b.ee below).[159] With reference to M. Shalabī,[160] M. El-Awa states that claiming the existence of a consensus is a method widely used by Muslim jurists when they wish to refute opinions contradicting their own.

The sources of the law and processes of deduction listed in the following are rooted in Sunni *uṣūl* doctrine. As regards contents the deliberations are to a great extent found among the Shi'ites as well, but under the multi-faceted heading of 'reason' (*'aql*). This extends from meaning deliberations on the interpretation of norms to being an independent source of norms besides Quran, sunna and consensus.[161]

5 Conclusion by Analogy and Other Methods of Deduction (*qiyās*)

The general term *qiyās* comprises not sources of law as such but (also) juristic methods of deduction.[162] The commonly used[163] translation 'conclusion by analogy' is not wrong, but does not go far enough. The conclusion by analogy is indeed included, but also the arguments *a minore ad maius*, *a maiore ad minus* and *a fortiori* as well as *e contrario* (*qiyās al-'aks*[164])[165] – basically the entire range of the art of juristic argumentation. On a general level al-Shāfi'ī equates *qiyās* with *ijtihād*[166] and allows scope for it where there are neither sufficiently clear provisions in the Quran and the sunna nor a binding consensus.[167] Al-Ghazālī's argument against those who reject *qiyās* on the grounds that everything relevant was already set down in the Quran is remarkable.[168]

159 Cf. al-Shawkānī, Nayl al-awṭār, vol. 7, 205 f.; al-Ghazālī, Al-mustaṣfā, vol. 1, 305 f.

160 Al-Shalabī, Muḥammad Muṣṭafā, Ta'līl al-aḥkām, Cairo 1949, 5 f. (quoted in El-Awa, Punishment, 47).

161 Cf. the overview in Löschner, Die dogmatischen Grundlagen, 149 ff.

162 Cf. the fundamental texts by Ibn Taymiyya, Risālat al-qiyās, and Ibn Qayyim al-Jawziyya, Fuṣūl fī l-qiyās. Concerning specific questions cf. also Ibn Taymiyya, Majmū'at al-rasā'il, vol. 2, 217 ff., showing the distinction between correct and incorrect *qiyās*; the latter then describes the argument *e contrario*; Ahmad Hasan, Analogical Reasoning; Kamali, Principles, 197 ff.

163 Cf. from among many recent works Nagel, Das islamische Recht, 159 f. and *passim*.

164 Cf. Ibn Taymiyya, Risālat al-qiyās, 10.

165 Cf. Tyan, Méthodologie, 79, 82 f.

166 Al-risāla, 477, transl. in Khadduri, 288.

167 Al-Shāfi'ī does not mention the latter throughout, but in important places, e.g. Al-risāla, 508 and *passim*; transl. in Khadduri, 288.

168 Al-Ghazālī, Al-mustaṣfā, vol. 2, 256.

Where, he asks rhetorically, are the provisions regarding the legal situation of the grandfather of the deceased compared to his brothers under inheritance law, etc.? The legitimacy of other sources of law such as *ijmāʿ* and *qiyās* is shown by the Quran and the sunna; the legitimacy of *qiyās* also by *ijmāʿ*. The Quran does not forbid *qiyās*, consequently its opponents would be prohibiting something that is permitted (thus contravening a fundamental maxim of Islamic law).

Al-Shāfiʿī also provides an instance of *qiyās* in its guise of argument *a minore ad maius* (a general rule deduced from a specific one):[169] namely that the firmest *qiyās* could be inferred from the prohibition of a small amount found in the Quran or the sunna to imply the prohibition of a larger amount. The
63 example he quotes is the transmitted prohibition to shed the blood of one of the faithful, to take his possessions away from him, and the commandment to think only well of him. If it is thus forbidden to think ill of someone, contradicting the good which is known about him, it must surely be all the more forbidden to speak ill of him without foundation. Another argument based on *qiyās* – in the context of how to deal with theft according to the Quran (*sariqa*) – is also attributed to al-Shāfiʿī and the early scholar Zufar, and can be interpreted only as an argument *e contrario*. Al-Sarakhsī discusses it:[170] The case postulated is that several accomplices break into a place of safekeeping, but that only some of them actually remove the booty, and the question arises of whether those accomplices who did not physically carry away the booty should also be punished. Al-Shāfiʿī and Zufar objected on the grounds that the person carrying the – unlike a beast of burden loaded by all those involved together (and here we have the argument *e contrario*) – is the sole agent of removing the booty while the others were not immediately involved. Al-Sarakhsī on the other hand invokes the *istiḥsān* (more on which immediately below), which focuses on the deliberate cooperation of all involved.

The *qiyās* as an institution – not, however, all the methods of deduction collected – is rejected by parts of the Hanbalite school,[171] the Zahirite school,[172] several other scholars[173] and large parts of the Shiʿa (with the exception of the

169 Cf. e.g. al-Shāfiʿī, Al-risāla, 513 f.; transl. in Khadduri, 308.

170 Kitāb al-mabsūṭ, vol. 9, 149.

171 Cf. Melchert, Formation, 179.

172 Cf. Ibn Khaldūn, Al-muqaddima, 446; Goldziher, Die Ẓâhiriten, 156 ff.

173 Concerning the hostile attitude of the great hadith collector al-Bukhārī, which has rarely been taken into account cf. Lucas, Legal Principles, 289, 303 ff. with further references.

Zaydis).[174] This rejection is based on sura 7:11–13, sura 15:28–36 and sura 38:71–78. According to the last-named the angel Iblīs (with overtones of the Greek *diabolos*, devil) refused to prostrate himself before Adam at God's command as Adam was made from clay, while he (Iblīs) was made from fire. In response God banished him from Paradise, an action seen as the prohibition of any kind of *qiyās*.[175] Supporters of *qiyās*, on the other hand, base their opinion on a number of verses from the Quran[176] and on the daily practice of the prophet and his companions.

According to classical understanding the *qiyās* must be based on an enduring (i.e. not abrogated) passage of the Quran, sunna or *ijmāʿ*. The point of law dealt with there must be comparable to the one in need of adjudication (*mutasāwī*). For this purpose the reason (*ratio*) (*ʿilla*) of the basis on which the analogy is drawn has to be determined. It must be clear (*ẓāhir*), definite (*munḍabit*) and suitable (*munāsib*) and may not be a regulation applying to special or exceptional cases (*waṣf qāṣir*, *mukhtaṣṣ*). If the reason (*ratio*) discovered can be transferred onto the case in need of adjudication, the latter will be subject to the same judgment.[177] Works on the subject contain an abundance of nuances concerning individual details.

An example of the conclusion by analogy is furnished by the decision according to which the father of a deceased man excludes the latter's siblings from the 64
succession. The analogy is based on sura 4:176, which excludes the siblings of the deceased in favour of his sons. The shared reason is that the agnate blood relationship in the ascending and descending line is stronger than the cognate blood relationship.[178]

The decisions arrived at by applying *qiyās* are at first isolated and, due to human fallibility in the process of deduction, subordinate to Quran, sunna and *ijmāʿ*. If universally recognised they may, however, be upgraded to *ijmāʿ*.[179]

174 Cf. Fyzee, Shīʿī Legal Traditions, in Khadduri/Liebesny, Law I, 122 and ff.; Kamali, Principles, 221.

175 Example used by Prof. Ibrāhīm Salqīnī in the lecture *Uṣūl al-fiqh* at the Law Department of the University of Damascus during the academic year 1984/85.

176 Sura 5:90; sura 38:28; sura 86:78 f.

177 Cf. Khallāf, Maṣādir, 50.

178 Islamic inheritance law modifies the strictly agnate inheritance law previously in force; cf. Spies/Pritsch, Klassisches islamisches Recht, 220, 230 ff.

179 Cf. al-Ghazālī, Al-mustaṣfā, vol. 2, 293; Ibn Qudāma, Rawḍat al-nāẓīr, vol. 3, 847; Milliot, Introduction, 144.

6 'Considering (Something) to be Better' (*istiḥsān*)

The Hanafite school frequently employs the institution of *istiḥsān* ('considering (something) to be better', preferring).[180] This is used to prevent legal consequences which would have to ensue if other sources of law were applied. Advocates of *istiḥsān* find support for its significance in sura 39:18 and 55, in a – contested – prophetic tradition[181] and in further sources. Thus forward purchase (*salam*)[182] and contracts for work and materials[183] are permitted as an exception – contrary to Shafiite opinion – and contrary to the rule according to which the object of purchase must be fixed at the time of contract (cf. also below 4.4.b).

The most frequent case in which it is applied is *istiḥsān* against *qiyās*. Al-Sarakhsī[184] has examples: The starting point is the prohibition of unauthorised settlement of succession (beyond permissible bequests amounting to no more than a third of the estate). *Qiyās* would thus also entail the prohibition of the dying man's acknowledging a debt. *Istiḥsān* on the other hand demands the effectiveness of such acknowledgements up to the freely disposable third of the estate. This really only states the basis of the analogy and confirms that as far as the free third is concerned, there is no infringement of the provisions of inheritance law at all. This is precisely the target for criticism of the institution of *istiḥsān*: it has no place, for either the conclusion by analogy is incorrect or the regulation has no basis in the sharia.[185]

In the case of the owner of the property being liable for damage caused by a collapsing wall, *istiḥsān* is applied as well.[186] If the wall was not constructed in the proper fashion, the owner will be liable; if it was built properly, he will not be liable. In the latter case *qiyās* prescribes freedom from liability also in the
65 event that the wall should lean later. *Istiḥsān* on the other hand could be used

180 In great detail including modern examples: Kamali, Istihsan.

181 *Mā raʾāhu l-muslimūna ḥasanan fa-huwa ʿinda Allāhi ḥasan*; in al-Ghazālī, Al-mustaṣfā, vol. 1, 267 f. with criticism.

182 Thus the prophetic tradition 'He who negotiates a forward purchase contract must do so only regarding items fixed as to their weight and size and for a fixed date' (*man aslama falyuslim fī kaylin maʿlūm ilā ajalin maʿlūm*), al-Bukhārī, Ṣaḥīḥ, vol. 3, 43 f. For a detailed study cf. Diem, Arabischer Terminkauf, esp. 25 ff.

183 Cf. Mahmassani, Falsafat, 85.

184 Kitāb al-mabsūṭ, vol. 18, 186.

185 Ibn Taymiyya, Majmūʿat al-rasāʾil, vol. 2, 218; cf. also Ibn Qayyim al-Jawziyya, Iʿlām, vol. 1, 269; cf. also Mahmassani, Falsafat, 85 f.

186 Kitāb al-mabsūṭ, vol. 27, 8 f.

to justify liability if the owner was aware of the later change (the wall's changing angle). In this case the omission (despite the owner's presumed ability to take preventive action within reason) is equated to the original illegal course of action (poor construction work).

A further example concerns the pledging of one's ward's property. There is agreement that a guardian may not use his ward's property to pay his own debts; the question is whether he is entitled to pledge it against his own debt. The *qiyās* – with Abū Yūsuf – would be opposed to this course of action as in the event of default the property would be used for the guardian's own ends and without necessity. Others, like Abū Ḥanīfa and al-Shaybānī opposed this by *istiḥsān*: it is undisputed that the guardian may deposit the ward's property for safekeeping. In this case the custodian, unlike a pledgee, would not be liable for the loss of the property. In addition the ward would be granted a title for compensation against the guardian in case the pledged property should be used in the event of default.[187]

The last example refers to crimes of homicide and bodily injury among strangers who are guaranteed protection in territories under Islamic rule (*musta'min*; cf. also 4.9.d.bb below). According to al-Sarakhsī[188] a conclusion by analogy would mean that due to the existing guarantee of protection the perpetrator would be subject to talion law (*qiṣāṣ*), as he would be in any situation of the kind, as the guarantee of protection supersedes the foreigner's ordinary status of having no right to protection under the law.[189] *Istiḥsān*, however – still according to al-Sarakhsī – would lead to the contrary result, as the guarantee of protection revokes an enemy foreigner's (*ḥarbī*) unprotected status only temporarily. The foreigner might return to enemy territory at any time, thus the case should not be treated any differently than if the foreigner was killed on enemy territory.

The other schools reject *istiḥsān* on the whole.[190] Al-Shāfiʿī[191] refers to it in the same breath as 'arbitrariness' (*taʿassuf*).[192] The example he adduces shows, however, that he primarily rejects decisions made by ignorant people: no one would ask a just scholar with no knowledge of the prices of slaves concerning the value of an (injured) slave. If this is true of an issue of such comparatively

187 Cf. al-Sarakhsī, Kitāb al-mabsūṭ, vol. 21, 102; Abū Zahra, Mawsūʿa, vol. 1, 417; Salqīnī, Al-muyassar, 153 f.

188 Kitāb al-mabsūṭ, vol. 26, 133 f.

189 Arabic uses the term of *ibāḥa*, the general 'permittedness' (in this case: of assault).

190 Cf. Wizārat al-awqāf, Al-mawsūʿa, vol. 3, 218.

191 Al-risāla, 507; transl. in Khadduri, 305; in detail al-Shāfiʿī, Kitāb al-umm, vol. 7, 492 ff.

192 Al-risāla, 507; transl. in Khadduri, 305.

small importance, surely it would be even more the case in questions regarding God's commands and prohibitions. In another place[193] al-Shāfiʿī emphasises that in his opinion *istiḥsān* beyond a *qiyās* based on the Quran or the sunna is not permissible.

66 Despite their hostile attitude towards the institution of *istiḥsān* as such, the other schools do employ instruments of comparable function. Of particular importance is *istiṣlāḥ*, to be described below. A modern author employing traditional arguments[194] can use *ḍarūra* (necessity) as the generic term shared by both these institutions.

7 Considering the Universal Good (*istiṣlāḥ, al-maṣāliḥ al-mursala*)

While Malikites, Shafiites and Hanbalites on the whole reject the *istiḥsān* as an instrument of deducing laws, they accept considering of the universal good (*istiṣlāḥ*) as a permissible instrument of finding the law.[195] It is possible to distinguish three categories in this context.

There can be no doubt that the universal good is part of all the reasons (*rationes*) (*ʿilal*, sg. *ʿilla*) open to analogy on which the existing legal provisions are based.[196]

Conversely, an 'abrogated benefit' (*maṣlaḥa mulghāt*) may be determined, if there are valid regulations which contradict this concrete consideration of benefit.[197] Based on this argument it is not permissible to prohibit polygamy with the aim of avoiding quarrel and inequality in a desirable manner ('benefit'). This argument would be in conflict with the permission of polygamy in sura 4:3 – this being the classical interpretation of this verse. The permission of polygamy is in turn justified with the desirable increase of offspring, the avoidance of immoral actions and provision for war widows.[198] This illustrates clearly that a historical interpretation may arrive at different results (cf. Part 2, 1.2, 3.1.h below).

193 Al-risāla, 503 f.; transl. in Khadduri, 304 f.; cf. also al-Shāfiʿī, Kitāb al-umm, vol. 7, 155 f.

194 Muslehuddin, Islamic Jurisprudence, 4. 52 ff.

195 Cf. Mahmassani, Falsafat, 85 ff.; Muslehuddin, Islamic Jurisprudence, 53 ff.; Kamali, Principles. 267 ff.

196 Cf. Salqīnī, Al-muyassar, 86.

197 Cf. Ibn Qudāma, Rawḍat al-nāẓīr, 537 ff.; al-Ghazālī, Al-mustaṣfā, vol. 1, 284 f.; Salqīnī, Al-muyassar, 159 ff.

198 Cf. Salqīnī, Al-muyassar, 159 f. with further references.

The third category, for which there are no textual references (*naṣṣ*), is subject to controversy. The presumed basis in this case is that the entire legal system was created for the benefit of people,[199] and only comprehensive consideration of the universal good (protection of the classic five goods religion, person, reason, offspring and property[200]) would do this justice. At the same time *istiṣlāḥ* would allow the inevitable adaptation to changed circumstances. In practice it was often employed to refute a theoretically binding conclusion by analogy. As in the case of *istiḥsān*, opponents suspect improper deduction of laws.

The rule – which offers wide scope for interpretation in specific cases – according to which certain legal provisions have no validity in an emergency, is also part of this area.[201] Necessity (*ḍarūra*) is thus accepted as a type of 67
source of law.[202] The Ottoman Mecelle of 1876 codifies it explicitly in Art. 17. The phrase 'necessity knows no laws'[203] is, after all, familiar to us in the West as well. The much-quoted[204] tradition by the caliph 'Umar provides an instance: 'theft' of foodstuffs is not punished in times of need.[205] Ibn Taymiyya even states that the consumption of alcohol is permitted to the Muslim Tatars, as it would not stop them praying but rather stop them murdering, kidnapping and pillaging.[206]

Overall, *istiṣlāḥ* offers a wide basis for the consideration of the 'weak human nature' emphasised frequently by the Quran.[207] In addition the question of *maṣlaḥa*, the universal good, opens the door to the dynamic interpretation of regulations with reference to the respective time or place. This is particularly true of those which allow greater scope to the rational cognitive faculty.[208]

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199 Cf. Al-Ghazālī, Al-mustaṣfā, vol. 1, 288; Salqīnī, Uṣūl al-fiqh, 148.

200 Cf. only Ibn Khaldūn, Muqaddima, 288; al-Shāṭibī, Al-muwāfaqāt, vol. 2, 8; Hamidullah, Administration, 163 ff., 171.

201 Cf. e.g. sura 2:173, 185, 239; 5:4; 6:119, 145; 16:115; 22:78; Muslehuddin, Islamic Jurisprudence, 60 ff.

202 Cf. Muslehuddin, Islamic Jurisprudence, 60 with further references.

203 Cf. the many references for this and other statements with the same gist in K. F. W. Wander (ed.), Deutsches Sprichwörter-Lexikon, vol. 3, 1051 ff. (reprint of the Leipzig 1867 edition), Stuttgart 1987.

204 Cf. Muslehuddin, Islamic Jurisprudence, 49.

205 Cf. e.g. Ibn Qayyim al-Jawziyya, Iʿlām, vol. 3, 17 f.

206 Cf. Mahmassani, Falsafat, 117; Muslehuddin, Islamic Jurisprudence, 55 f.

207 Cf. sura 2:185, 286; 4:28; 7:42; 8:66; 22:78; cf. also sura 5:6.

208 Cf. Opwis, Concept, 62 ff.

8 The Opinions of (Individual) Prophet's Companions (*madhhab al-ṣaḥābī*)

Under certain circumstances the opinions of individual prophet's companions are recognised as possessing normative character.[209] There is a high degree of agreement on the fact that the prophets' companions' practice is binding in matters concerning the afterlife; the same is true of consensus decisions on secular legal matters. There is furthermore agreement that opposing statements by prophet's companions neutralize one another, as it were – one cannot be used as a source of law against another.[210]

There is continuing controversy on the normative character in the case of statements by a companion which have not been confirmed as a consensus decision but which were not contradicted at the time by other rules, either. Supporters of the binding effect (Hanafites, Malikites, some Hanbalites) base themselves on sura 7:199, on a prophetic tradition[211] and on the *ṣaḥāba*'s proximity to the event of the revelation. Opponents (Shafiites and other sections of the Hanbalites) point out the fallibility of the prophet's companions and historical examples to the contrary.[212]

Legal differences emerge, depending on the recognition or rejection of this source of law, for instance with regard to the position under inheritance law of a woman who was divorced irrevocably, and thus with legally binding effect
68 (*muṭallaqa bā'in*), by a dying man who then dies during the statutory period of waiting before she may remarry (*'idda*). Advocates of a legal obligation refer to a statement by the caliph and prophet's companion 'Uthmān, who supported the claim to inherit. Opponents base their argument on the general discontinuation of the claim to inherit once the divorce has been made final.[213]

209 Cf. e.g. Kamali, Principles, 235 ff. With prudent differentiation: al-Shāfi'ī, Al-risāla, 295 f., with the comment that there were hardly any cases where the statements of individual prophet's companions remained without contradiction.

210 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 203 ff.; Salqīnī, Al-muyassar, 171.

211 'My companions are like the stars; you will be rightly guided whichever one you follow' (*aṣḥābī ka-l-nujūm bi-ayyihim iqtaḍaytum ihtadaytum*); cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 269.

212 Cf. Salqīnī, Al-muyassar, 172.

213 Cf. al-Zuḥaylī, Al-fiqh, vol. 7, 452 f. with further references.

9 Customary Law (*ʿurf*) and Custom (*ʿāda*)

From the point of view of works of sharia theory, customary law (*ʿurf*) is accepted as long as it does not contradict the mandatory rules of the sharia. This is often expressed in such a way that all customary law may be recognised if it does not prohibit what is permitted and permit what is forbidden.[214] Its validity as a source of law is supported by sura 7:199 and a prophetic tradition.[215] Some scholars also adduce *istiṣlāḥ*.[216] Contemporary scholars of the Indian Islamic Fiqh Academy even give common custom (*ʿurf-e ʿaam*) precedence over *qiyās* and allow *qiyās* to be abandoned following a widespread special custom.[217]

A practical instance of recognised customary law is the specification of gifts the groom (*khāṭib*) gives the bride (*makhṭūba*[218]) on the occasion of their betrothal as presents (*hiba*) rather than as part of the obligatory dower (*mahr*). Another instance is taking possession of purchased goods after being told their purchase price. This is seen as the consensus necessary in order to conclude a contract (offer and acceptance; cf. 4.4.d below).[219] Further instances are the tacit agreement to pay in the respective national currency, goods being free from faults even without prior agreement, or the tacit agreement to pay the customary fee (*ujrat al-mithl*) for commercial services.[220]

Customary law could be strengthened by means of putting the relevant mechanisms of finding the law into written form; the Moroccan *ʿamal* literature of the fifteenth to seventeenth centuries is often adduced as an instance.[221] Thus the term *ʿamal* also occurs as a synonym for (local) customary law, especially with the connotation of actually applied law.[222] The fact that Islam

214 *La yuḥrim al-ḥalāl wa la yuḥill al-ḥarām*; cf. Salqīnī, Al-muyassar, 165; Kamali, Principles, 283 ff.; on its extensive social acceptance as something 'Islamic' see Rosen, The Justice, 85 ff.

215 *Ma raʾāhu l-muslimūna ḥasanan fa-huwa ʿinda Allāhi ḥasan*; in al-Ghazālī, Al-mustaṣfā, vol. 1, 267 f. with criticism.

216 Salqīnī, Uṣūl al-fiqh, 152.

217 Islamic Fiqh Academy (India), Juristic Decisions (2009), 33 para. 4.15.

218 The linguistic forms – 'groom' as the active participle of the verb, 'bride' as the passive one – indicate the ideas of who plays which part in preparing the way for a marriage.

219 Cf. al-Zuḥaylī, Al-fiqh, vol. 4, 99 f. and also Art. 175 of the Ottoman Mecelle.

220 Cf. Ibn Qayyim al-Jawziyya, Iʿlām, vol. 3, 3.

221 Concerning the controversy over the interpretation of the texts in question cf. Rosen, The Justice, 25 f., 34 ff. with further references.

222 Cf. al-Yaḥṣūbī, Tartīb al-madārik, vol. 1, 19 ff., 22 ff. and already the discussion in Mālik ibn Anas and Saḥnūn's works (references in Ch. Müller, Sitte, 34 n. 57).

generally recognised customary law is likely to have been a decisive factor in its expansion.[223] To this day we find ways of life in many parts of the Islamic world, which have closer ties to pre-Islamic customs or specific local practices than to the detailed doctrines of Islamic law. This may be the reason why there is only little information on customary law to be found in classical as well as modern
69 juristic literature. Another explanation might be that it is hardly possible to generalise local customary law, which is consequently of little interest as a genre within a discussion on fundamental principles of the law. In general, customary law seems to be most widespread in societies based on strong tribal or extended family structures in weak states. It was observed that stable conflict resolution supported by the whole collective involved often trumps the enforcement of individual rights in case of conflict.[224]

A widespread distrust of this source of law is, however, also discernible, as it has led and still leads to a significant restriction of sharia norms in many places; frequently, although not always,[225] to the disadvantage of women.[226] The Libyan law on the protection of women's right to inherit of 1959 (Law no. 6 of 1959) is representative: more than a millennium after the Islamisation of the country it was enacted to ensure that the provisions of Islamic law in favour of women's right to inherit were not undermined by local customary law to their disadvantage.[227] It is reported of the Bedouins of the Arabian peninsula that during the first half of the twentieth century daughters had no part in their father's estate if there were brothers.[228] The author's research among Muslims in India has found that there, too, women are frequently denied their share

223 Cf. e.g. M. Ismaïl, Les normes, 27, 52 ff.

224 Information given by Yemeni participants of a conference on German-Yemeni scientific cooperation in Berlin on 17 December 2013. For the judiciary in Yemen in the last century cf. Messick, The Sharīʿa Judiciary, 149, 153 ff.

225 Concerning the Malay customary law, now adopted into Islamic legislation, according to which a wife has a claim to a share in property acquired by the husband during the marriage (*Harta spencarian*) cf. Nik Noriani, Nik Badli Shah, Marriage, 2001, 124 ff. with further references.

226 For examples from India cf. Part 3, 2.2.6 below; regarding Egypt in the first half of the twentieth century see Shaham, Family, 224 ff. and *passim*. There is also a multitude of relevant instances in An-Naʿim (ed.), Islamic Family Law in a Changing World, 2002.

227 Reference in Mahmood, Statute of Personal Law, 150; 30. Cf. Hess, Beduinen, 137. For the competing application of sharia and customary law in Libya cf. Layish, Sharīʿa and Custom in Libyan Tribal Society, 2005; for the Bedouins of the Judean desert cf. Layish, Legal Documents, 2011.

228 Cf. Hess, Beduinen, 137.

of an inheritance.[229] With regard to the tribal regions of Pakistan (North West Frontier Province) the Pakistani jurist Shaheen Sardar Ali describes women's position as follows: 'Women, in customary law, are legal non-entities at worst; at best they are perpetual legal minors under the guardianship of a male relative'.[230]

Even in the heartland of the Islamic world legal customs survive to the present which are in clear opposition to scholars' jurisprudence.[231] Among these is the widespread practice of so-called 'honour killings', which on the whole cannot be legitimised by the provisions of Islamic law (cf. Part 2, 3.4.c below).[232]

Overall recognition of customary law as a source of law and the multitude of opinions on almost every point of law allows a wide scope of application. In large areas of the Islamic world Islamic law as we find it in the works of legal scholars is practised only in part or not at all. Consequently there will be many cases in which a study of expert opinions and documents will yield more information on everyday legal practice than the frequently stereotypical, repetitive remarks in textbooks.

It is important to distinguish between the institution of customary law and the consideration of local or social traditional forms of action and thought as evidence of the existence of certain preconditions for legal relations. This is frequently described by the term *ʿāda* (custom, tradition). Despite the vague terminology it is possible to say that the legal system will not accept every *ʿāda* 70
as customary *law* and that, unlike customary law, it has to be substantiated

229 Thus e.g. Dr Zafarul-Islam Khan, editor-in-chief and publisher of the Milli Gazette, in a conversation with the author on 10 May 2006 in New Delhi; he added that officially this is denied, but it is indeed a fact (similarly Prof. Imtiaz Ahmad in conversation on 10 May 2006 in New Delhi, Asghar Ali Engineer during a conversation in Mumbai on 14 June 2006 and Yusuf Hatim Muchhala, Member of the executive committee of the AIMPLB during a conversation in Mumbai on 15 June 2006); the women frequently do not insist on their rights in order to preserve family peace.

230 Ali, Gender and Human Rights, 175.

231 Cf. Gräf, Rechtswesen, e.g. 42 ff.: execution of a thief by pushing him off a cliff, homicide upon breach of marriage norms: Moors, Women, Property and Islam, 48 ff.; Ebert, Das Erbrecht, esp. 129 f.

232 Cf. Wehler-Schöck's in-depth study, Ehrenmorde, 41 ff., 59 and *passim*; cf. also Welchman, Honour, 139 ff., 147 ff., which includes a section on the debate surrounding a husband killing his wife or her partner caught 'in the act'; Eisner, M./Ghuneim, L., Honor killing attitudes, 405 ff.

in every case.[233] However, the terms *ʿurf* and *ʿāda* frequently follow one another indiscriminately.[234]

Every legal practitioner will have to consider these customs, even if he means to apply the provisions of Islamic law. Lawrence Rosen, who studied Moroccan court hearings extensively, reports a quarrel between a wife, who had since returned to her family of origin, and her husband, who wanted to force her to return to him. The wife produced 50, later 12 witnesses related to her from her home town, who testified to the (effective) one-sided divorce pronounced by the husband. The husband for his part brought 12 witnesses from the place where the marital home was situated, who testified that the marriage had been contracted in a legally effective fashion and not been dissolved. The court decided against the wife, on the grounds that the witnesses produced by the husband were more credible as they were living closer to the place of (possible) events and consequently would have known of a divorce having taken place. Furthermore the husband's readiness to take the judicial road in order to continue the marriage spoke against a wish for divorce on his part (of course, he might just have changed his mind). After all, the wife did not accuse him of ill-treatment, and consequently it seemed as if her family were trying to disrupt the marriage for some reason.[235] This example illustrates the interaction between the application of the law and the interpretation of facts derived from observations related to social types, which do of course document a clear preconception of gender roles (cf. 4.2 below). This might be said to be one of the most interesting subjects for study; but it would require excellent command of the language and willingness to undertake painstaking field work. It is possible that certain collections of fatwas might serve to illuminate the darkness further.

It is not possible to go into the fact that a considerable proportion of ancient Arab customary law was incorporated into the development of classical Islamic law. According to Samil Balić[236] this portion of the sharia's inheritance is so great that Oriental customary law might be called the fifth source of *fiqh* (besides Quran, sunna, *ijmāʿ* and *qiyās*). In this, he is aiming at the necessity of reinterpretation (more on which in Part 2, 1.2 below).

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233 Cf. Ch. Müller's erudite paper, Sitte, Brauch und Gewohnheitsrecht im mālikitischen fiqh, 17 ff.

234 Cf. Gräf/Falaturi, Brauch/Sitte und Recht, 29, 32 ff.

235 Rosen, The Justice, 9 f.

236 Balić, Islam für Europa, 85.

10 'Blocking the Means' (*sadd al-dharāʾiʿ*) 71

Literally translated *sadd al-dharāʾiʿ* means 'blocking the means', the access, meaning that everything which might lead to something prohibited is itself prohibited.[237] This provides a corrective on the content level for formalistic views of the law which tolerate de facto avoidance of the law as long as external forms are kept up. The provision is based on suras 2:104, 6:108 f. and 20:43 f. as well as prophetic traditions and decisions by prophet's companions. Its scope of application differs clearly between schools. Malikites and Hanbalites, who overall focus more strongly on the *forum internum* (*nīya*, intention), allow it a wider application.[238] Hanafites and Shafiites, on the other hand, restrict the rule to cases where the intention appears to be in all probability to avoid a prohibition in the abstract as well as the concrete view.[239]

The gift from a debtor to a creditor provides an example, as it might be an infringement of the classical interpretation of the prohibition of charging interest, or the prohibition on this basis of giving gifts to officials, in order to prevent corruption.[240] Further examples may be found in regulations concerning prejudice (e.g. excluding a judge from decisions concerning his wife or children; ignoring a spouse's testimony in favour of the other spouse because of the former's – possible – advantages under inheritance law).[241] Present-day Syrian legislature has employed *sadd al-dharāʾiʿ* as grounds for legal restrictions of polygamy:[242] The command in sura 4:129 to treat several wives equally has traditionally been seen as 'only' a moral command. Now it is used as the starting point for regulations to prevent that unequal treatment should occur. Consequently polygamy, which was traditionally unrestricted, is interpreted as a means that might lead to prohibited actions, thus significantly enhancing the status of the command in sura 4:129.

At this point it seems that a look at present-day Europe would be appropriate. According to the author's information, among Muslims focused on scripture the application of the Islamic doctrine of norms appears to decide e.g. the question of whether Muslims might be permitted from a religious point of view to attend functions during which alcohol is consumed. Those who deny this

237 Cf. Ibn Qayyim al-Jawziyya, Iʿlām, vol. 3, 108 ff., esp. 109; Kamali, Principles, 310 ff.

238 E.g. Ibn Taymiyya, Majmūʿāt al-fatāwā, vol. 23, 214 f., is very discriminating; unlike the Malikite opinion, he would not apply this rule in case of need (*ḥāja*).

239 Cf. Salqīnī, Al-muyassar, 172 f.; al-Raysuni, Imam al-Shatibi's Theory, 56 ff.

240 al-Raysuni, Imam al-Shatibi's Theory, 58 f.

241 Cf. Salqīnī, Al-muyassar, 185 f.

242 Cf. Coulson, A History, 208 f.

ultimately refer to the rule of *sadd al-dharāʾiʿ*: one should not put oneself into the way of temptation at all. Others argue that such a rule might be justified
72 in a society where Muslims are in the majority, but that circumstances are different in an environment where temperate consumption of alcohol on certain occasions is a social, or at least an accepted, custom. One might exclude oneself from important conversations and social events; this is outweighed by the benefit (cf. the argument of *maṣlaḥa* in 7 above) of (abstinent) participation.

11 'Continuance' (*istiṣḥāb*) and 'Norms of Those before Us' (*sharʿman qablanā*)

Another instrument of reasoning is the so-called *istiṣḥāb*, literally 'adhering (to sth.)'.[243] This includes the presumption according to which a legal position will continue to exist once it has been established and no definite change has occurred. In the absence of this presumption – e.g. of the continuance of acquired possessions – structured legal relations would simply be impossible. The rule is based on sura 4:29; 6:145 and 17:15 as well as prophetic traditions and consensus.[244]

One example is the continuance of a marriage if there are doubts regarding the divorce.[245] The principle of *ibāḥa aṣlīyya* mentioned above (1.) – the basic freedom from obligations – is also justified in this way.[246]

Beyond the Shafiite school, *istiṣḥāb*, however, only has limited scope. The presumption of continuance should be effective only with regard to existing legal positions, thus preserving the law, but not beyond. Examples of its application may be found in al-Sarakhsī's works, e.g.[247] in the case of the right of inheritance of a missing person (*mafqūd*) who is neither known to be alive or dead. His property is not distributed, as the continuance of the status quo is presumed (i.e. that he is still living).[248] This simply takes into account the necessity of not burdening later legal processes with insecurity and insoluble difficulties in case of reversal. If the presumption of continuance were valid without restriction, the missing person would in turn have a right to inherit.

243 Cf. e.g. Kamali, Principles, 297 ff.

244 Cf. Salqīnī, Uṣūl al-fiqh, 175.

245 Cf. ibid.

246 Cf. Kamali, Freedom, Equality and Justice, 56.

247 Kitāb al-mabsūṭ, vol. 30, 54.

248 In this case judicial administration of the estate is established. The estate is used to e.g. settle maintenance claims; cf. al-Marghīnānī, Al-hidāya, vol. 1, 423.

Some scholars are of this opinion, which means that for them *istiṣḥāb* can be a factor in finding the law. The Hanafites reject this as being pure fiction.[249]

If Islam's sources of law do not contain a definitive rule, the principle of continued application of traditional regulation, from the Torah (*tawrāt*) and the Bible (*injīl*), applies. After all, Islam sees itself as the correction of misguided developments in the book religions Judaism and Christianity and as their 'true' continuation.

In the opinion of many the corpus of legal rules found in the holy scriptures 73
of Judaism and Christianity is *shar' man qablanā* ('rules of those who came before us'), as long as it was not abrogated later.[250] This opinion is based on suras 6:90; 16:123 and 14:13, as well as prophetic traditions and the oneness of divine law. Sura 10:94 commands clearly that the 'people of the book' (in particular Jews and Christians) must be consulted in case of doubt, including in the context of the so-called *isrā'īliyyāt*, narratives from Biblical tradition.[251] Indeed, the Hanafite Abū Yūsuf goes so far as to describe the pre-Islamic sunna that was not abrogated by Islam as unalterable even in extreme cases. This meets with contradiction from Malikites and Shafiites who maintain that not even Islamic law is unalterable in extreme cases.[252] The opponents of *shar' man qablanā* refer to sura 4:48 and other traditions.[253]

The practical significance of *shar' man qablanā* is comparatively small. It is relevant e.g. with regard to the owner's liability if freely grazing livestock causes crop damage. Opponents of *shar' man qablanā* rule out the liability with reference to a prophetic tradition, while the supporters refer to David's and Solomon's decision, described in sura 21:78, according to which liability exists in the case of damage caused overnight.[254]

All in all we can see clearly that there has been a gradual development of a self-referential system of sources of law and instruments of finding the law, within which the Quran and the sunna (*naṣṣ*) are the most prominent. The other institutes are more or less controversial and consequently comparatively easy to re-interpret. During the classical period, the widely followed doctrine of *taqlīd* (1., 4. above) precluded this. After all, the potential of adapting to the requirements of the times is also inherent in classical Islamic law.

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249 Cf. Salqīnī, Al-muyassar, 190, 192.

250 Cf. Salqīnī, Uṣūl al-fiqh, 160 ff.

251 Bobzin, Der Koran, 112 f.

252 Cf. al-Balādhurī, Futūḥ, 448; Schacht, Elements, 9, 10 f.

253 Cf. Hamidullah, Sources, 205, 210 f.; Sanhoury, La responsabilité, 1, 18 f.

254 Cf. Salqīnī, Al-muyassar, 179 f. with further references.