Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts

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INTRODUCTION

> [Rabbinic law] was a system of law akin at many points to Arabian custom, founded on the same monotheistic principles and imbued with the same spirit as Islam.[1]

This study compares the theory of the "four roots of the law" developed by Muslim jurists in the eighth and ninth centuries with the jurisprudential bases of the Babylonian Talmud.

Jewish and Islamic law are theocratic legal systems resting on the concept of a divine law revealed to a prophet in a scripture; for Jews, that scripture is the Torah, and for Muslims, the Qur'an.[2] Jewish rabbinic law developed during the first five centuries A.D., culminating in the editing of the Talmud in the sixth century.[3] Islamic

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1. S.G. Vesey Fitzgerald, "Nature and Sources of the Sharī'a" in Khadduri and Liebesny (*eds.*), *Law in the Middle East* (Washington, D.C. 1955, hereinafter "Sharī'a"), pp. 85-112, at p. 89.

2. Although the spelling Koran is more familiar to most readers, it is technically incorrect. I prefer to use the more accurate transcription which accords with Muslim practice and with the orthography of modern Islamic scholarship. However, in this study I treat the proper nouns Qur'an, Muhammad and Islam as sufficiently Anglicized to justify omitting the diacritical marks required in the accurate transcription of Arabic words. The italicized form *qur'ān* will be used when speaking of the Qur'an as a root of law rather than a scriptural text.

3. The extant text of the Torah (*Pentateuch*), resulting from some three to five centuries of redaction by at least four separate groups of editors, dates from about the tenth to fifth centuries B.C. For a survey of theories on dating and authorship, see M. Weinfeld, "Pentateuch," 13 *Encyclopaedia Judaica, cols.* 231-61. The process of oral interpretation is known to have begun as soon as the written text was complete and continued until the final editing of the Talmud in the sixth century A.D. (shortly before the birth of Muhammad). For a history of the development of the Talmud, see Jacob Neusner, *A History of the Jews in Babylonia* (5 vols., 1965-70).

law developed during the seventh through ninth centuries, culminating in the classical theory of Islamic jurisprudence.[4] The present study compares each of the four roots of Islamic law with its talmudic counterpart and examinies some striking parallels between the legal theory of Muhammad ibn-Idrīs al-Shāfiʿī (the "master-architect" of Islamic jurisprudence)[5] and the jurisprudential bases of Talmudic law. It is concluded from an examination of source texts that there is strong circumstantial evidence of Islamic "borrowing" of fundamental talmudic concepts.

Inheritance and Environment

Early Islamic law was largely adapted from the inherited Arabian culture. Indigenous customary law remained in force except where the Qur'an countermanded the prevailing practice.[6] Given the relative paucity of legal provisions in the Qur'an (which was not intended to be a comprehensive law code) this was inevitable.

Joseph Schacht and others have dated the origins of Islamic jurisprudence to the second century of Islam, that is to about one hundred years after the Muslim conquest of Mesopotamia in 637 A.D. (when the region was renamed Iraq).[7] This region had previously been part of the Persian Empire, with its centuries-old tradition of formal lawmaking and jurisprudence. Finding that "material influences causing changes in the doctrines of other [Islamic law] schools continued to proceed almost exclusively from [the law schools of] Iraq," Schacht concluded (with Goldziher) that "Muhammadan jurisprudence originated in Iraq."[8] The discovery that Islamic jurisprudence emerged on the banks of the Euphrates and not on the sands of Arabia, home of the Prophet and birthplace of Islam, clearly invites further investigation. The present study tries to shed some light on the matter.

Faith, Law and Theocracy

The influence of Judaism and Christianity on the *religion* of Islam is well documented. The notion of a God of creation, revelation

4. The Prophet Muhammad, born c. 570 A.D., began his mission about the year 610. Islamic jurisprudence, however, did not begin to evolve until the eighth century. N.J. Coulson, *A History of Islamic Law* (Edinburgh 1964, paperback 1978, hereinafter *History*) at p. 5 See also notes 7 and 8 below.

5. Coulson, *History*, p. 53. Shāfiʿī was born in 767 in Palestine and died in Egypt in 820. His *magnum opus*, the *Risāla*, is discussed in Part Two.

6. Coulson, *History*, p. 19.

7. J. Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford 1950, 1979 ed., hereinafter *Origins*) p. 190.

8. *Ibid.*, pp. 222-23. See also I. Goldziher, "The Principles of Law in Islam," in *The Historians' History of the World* (London 1904), vol. 8, pp. 294-304.

and redemption, deeply rooted in the soil of the Fertile Crescent,[9] is thought to have reached Muhammad through tales told by Jewish and Christian merchants plying the trade routes of Arabia.[10] The influence of midrashic and biblical sources has been traced in hundreds of qur'anic passages[11] (though discrepancies show that the Prophet had no firsthand knowledge of those texts). In particular, the fundamentals of Islamic faith and rite (the religious duties known as the "five pillars of Islam") have been traced by several scholars to Jewish biblical and talmudic sources.[12] The very name Islam, meaning "wholehearted submission [to God]," derives ultimately from a related Hebrew word used in scriptural and ritual exhortations to serve God "wholeheartedly."[13]

In contrast to extensive research on the connection between the Jewish and Muslim faiths, scant attention has been paid to the relationship between Jewish and Islamic *law*. Yet Judaism and Islam

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9. Besides Judaism, Christianity and Islam, two other monotheistic faiths which emerged at the two ends of the Crescent were those of Akhenaton and Zoroaster.

10. B. Lewis, *The Arabs in History* (London 1950; 4th ed., New York 1966, hereinafter *The Arabs*), pp. 38-39.

11. Principal works on this topic include: A. Geiger, *Was Hat Muhammad aus dem Judenthume Aufgenommen?* (Berlin 1833), tr. F.M. Young as *Judaism and Islam* (Madras 1898); H. Hirschfeld, *Jüdische Elemente im Koran* (Berlin 1878) and *New Researches into the Composition and Exegesis of the Qoran* (London 1902); J. Horovitz, *Koranische Untersuchungen* (Berlin 1926); C.C. Torrey, *The Jewish Foundation of Islam* (New York 1933); A.I. Katsh, *Judaism in Islam* (New York 1954); S.D. Goitein *Jews and Arabs* (New York 1955); E.I.J. Rosenthal, *Judaism and Islam* (London 1961); and, at the basic level of linguistic comparison, A. Jeffery, *The Foreign Vocabulary of the Qur'ān* (Baroda 1938).

12. The "five pillars" are: (1) affirmation of monotheistic faith and of Muhammad's apostolate; (2) communal prayer; (3) almsgiving; (4) fasting; and (5) pilgrimage. As to (1), compare "There is no God but Allah" with "Hear, O Israel, Yahweh is our God, Yahweh is One" (*Deuteronomy 6:4*). As to (2), (3) and (4), these are central themes of the Jewish sacred days of Judgment (New Year) and Atonement; moreover, the Arabic terms for prayer, almsgiving, fasting and repentance are not indigenous but are all derived from Hebrew/Aramaic terminology. As to (5), the Arabic *ḥajj*, "pilgrimage" (probably pre-Islamic) is linguistically identical with Hebrew *hagg*, "pilgrim festival" as found in the Torah. See works listed in note 11.

13. The qur'anic *qalb salīm*, "whole heart," as found in *sūras 26:89* and *37:84*, corresponds to biblical *lēbāb šālēm* in *I Kings 8:61* and in the talmudic *mōdīm* prayer recited daily in Jewish communal worship (*b. Ṣōṭāh 40a*). Jeffery (note 11 above, hereinafter *Vocabulary*, p. 62) points out that although the root *s-l-m* is native to Arabic as to Hebrew, the noun *islām* occurs in the Qur'an for the first time as a technical term borrowed from the older religions. His suggestion that it comes from a Christian Syriac (Aramaic) term for "devotion to God" may be correct, but it ignores the fact that the Syriac term stems ultimately from the Hebrew *šālēm*, as used precisely in this context in Jewish scripture and liturgy. (Incidentally, Goldziher's reference to "the *lēbh shālēm* of the Psalmist" (*Mohammed and Islam*, Newhaven, 1917, p. 18), must be taken as rhetorical; the phrase does not actually appear in the *Book of Psalms*).

share not only a religious framework but also a theocratic approach to law.[14] Both systems rest on the concept of a divinely-revealed law whose further applications are deducible by studying the sacred scriptures with the aid of prescribed rules of exegesis. In theocratic systems, this combination of divine revelation and human reason is the *only* path to law; such systems deny that law can be created, as in western humanistic theories, by human legislation.

Pre-Islamic Origins

Many scholars, including Snouck Hurgronje, Fitzgerald, Schacht and Liebesny, have proposed or assumed that, in searching for early influences on Islamic law (beyond pre-Islamic Arabian custom), Jewish law is an obvious starting point.[15] This is so, both because of the shared theocratic orientation and because of the geographic and temporal proximity of the two systems (the Talmud having been completed about the time of the Prophet's birth).[16] Moreover, the site of the most important early Islamic law school, the Ḥanafī school at Kufa,[17] was close to the Jewish academies of Sura and Pumbedita, where scholars studied the Talmud throughout the formative period of Islamic law. There would have been no problem of communication; the early Iraqi jurists included local converts to Islam, both Jews and others, who spoke the eastern (talmudic) Aramaic which remained the *lingua franca* of Iraq for centuries after the Arab conquest.[18]

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14. The separation of religion and law (or church and state) is a *western* notion. Neither Judaism nor Islam recognizes such a dichotomy, since both faiths postulate that both secular and religious law come equally from God. It is no accident that the same word, *dīn*, means "law" in Hebrew and "religion" in Arabic. See, however, note 151 below.

15. See, for instance: C. Snouck Hurgronje, *Selected Works* (*eds.* Bousquet and Schacht, Leiden, 1957), pp. 48-74; Fitzgerald, "Sharīʿa" pp. 85n, 89 and "The Alleged Debt of Islamic to Roman Law," 67 *Law Quarterly Review* (1951) 81-102 (hereinafter, "Alleged Deb → J. Schacht, "Foreign Elements in Ancient Islamic Law," 32 *J. Comp. Leg. and Int. Law* (1950), pp. 9-17, at p. 10; → H.J. Liebesny, "Comparative Legal History: its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions," 20 *Amer. J. Comp. Law* (1972) pp. 38-72, at p. 51. See also note 11 above.

16. Although Jewish tradition ascribes the editing of the Babylonian Talmud to R. Ashi (d. 428 A.D.) and Ravina (d. 499 A.D.), it is now known that the final editorial processes were carried out by the *sabora'im* ("explicators") of the sixth century.

17. This school, officially sponsored by the ʿAbbasid Caliphate which displaced the Ummayad Dynasty in 750 A.D., is the earliest school of importance and is one of four orthodox schools that survives today.

18. E.Y. Kutscher, "Aramaic," 3 *Encyclopaedia Judaica* 259, 275.

The Qur'an itself reflects strong Jewish and Christian influences.[19] The Meccan *sūras*[20] show the effect of contact with itinerant Jews and Christians on Muhammad's religious *thought*: but the prime influence on his secular and religious *lawmaking* (as is seen by comparing the contents of the Meccan and Medinan *sūras*), may have come from the Jews of Medina, a city founded long before Islam by Jewish tribes. The Jews still numbered eight to ten thousand (a majority of the city's inhabitants), at the time of the Prophet's arrival there in 622.[21] Both Jews and Arabs possessed ancient systems of customary law, but with this difference: while that of the Arabs was unwritten, that of the Jews was recorded in the Talmud, in languages (Hebrew and Aramaic) closely related to Arabic. Throughout the formative period of Islamic law, Jews lived side by side with Muslims in what Goitein has called a state of symbiosis.[22] With Arabic as their mother-tongue, the Jews of Arabia (like those of Iraq) could easily have been consulted by any Muslim jurist who followed the qur'anic exhortation to inquire, when in doubt, of "those who read the sciptures before you"[23] — a reference to Jews, Christians and Magians. Of these groups, only the Jews possessed a detailed corpus of theocratic law governing all aspects of life, religious and secular.

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19. Jeffery, *Vocabulary*, p. 5, notes that the reluctance to acknowledge foreign influence which characterizes most Muslim scholars did not exist in the earliest times, but dates only from the second century of Islam, when it arose from doctrinal imperatives. See note 34 below.

20. A *sūra* is a chapter of the Qur'an. Each *sūra* has been identified by Muslim exegetes as either Meccan (revealed before 622) or Medinan (revealed after the Prophet's move to Medina in 622). The origin of the term *sūra* (which is not native Arabic) is obscure; one interesting theory is that it resulted from a misreading and corruption of the Hebrew/Aramaic term *sedrā*, meaning the weekly portion of the Torah, which is divided into 54 such portions for Sabbath readings This is technically quite plausible because of the resemblance of Hebrew *d* to Hebrew *u* (particularly when handwritten in the days before printing). Hirschfeld, *New Researches*, note 11 above, p. 2, n. 6.

21. Tor Andrae, *Mohammed: The Man and His Faith* (1932, tr. T. Menzel 1936, Harper ed., New York, 1960) p. 134; W. Montgomery Watt, *Muhammad at Medina* (Oxford 1959), p. 192 ff; B. Lewis, *The Arabs*, pp. 31-32; S.D. Goitein, *Jews and Arabs* (New York 1955, 1964 ed.) pp. 46-50.

22. Goitein, *Jews and Arabs*, pp. 10, 65; *A Mediterranean Society* (Leiden 1967), vol. 2, p. 289.

23. Qur'an, *sūra 10:94*: "And if thou art in doubt concerning that which We send down to thee, then ask those who read the scripture that was before thee." (Qur'anic citations herein follow the numbering given in M.M. Pickthall's translation, *The Meaning of the Glorious Qur'an* (undated Mentor ed., New York). However, since Pickthall does not always translate literally, some translations given here are those of the present writer.

Four Roots of the Law

Classical Islamic law recognizes four *uṣūl al-fiqh*, "roots of jurisprudence." This metaphor implicitly compares law to a tree, just as the sages of the Talmud had done in interpreting the proverbial "tree of life" to mean the Torah.[24] The four roots of Islamic law are: *qur'ān*, divine scriptural revelation; *sunna*, oral tradition from the Prophet; *ijmāᶜ*, consensus of the jurists; and *qiyās*, the juristic method of logical argument. Although these "roots" took hold in the early days of Islamic law, it was left to the ninth-century jurist Shāfiᶜī to cultivate and refine them into the theory which was to form the basis of classical Islamic jurisprudence as set forth in the *fiqh* literature.

The potential for tracing the roots of Islamic law by comparing its terminology with that of older, related systems was suggested to the present writer by Schacht's statement that "[n]o comprehensive study of pre-Islamic legal terminology has been undertaken so far."[25] The present research was undertaken in the belief that a comparison of Islamic with talmudic legal terminology might prove fruitful; and many correspondences have indeed been found, which illuminated obscurities in one system or the other and will be published elsewhere.

The present study examines the jurisprudential structure of the two systems from the standpoint of the Islamic theory of four roots of the law. We shall find that each of these roots has its linguistic and conceptual counterpart in Jewish law. Several hypotheses will be advanced, including common semitic tribal origins, common environmental influences on the development of both systems, independent development (convergence), and strong evidence especially in Shāfiᶜī's case, of borrowing from talmudic sources.

1. THE ISLAMIC ROOTS AND THE ROOTS OF TALMUDIC LAW

The four *uṣūl al-fiqh*, "roots of [Islamic] jurisprudence," are *qur'ān*, *sunna*, *ijmāᶜ*, and *qiyās*. It is here proposed that these roots correspond, both linguistically and conceptually, with four basic

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24. *Proverbs 3:18:* "It is a tree of life to them that grasp it"; Talmud, *b. Berākōt 32b:* " 'Tree of Life' means the Torah." (Note: in talmudic citations, the prefix *b.* indicates the Babylonian Talmud and the prefix *m.* indicates the Mishnah).

25. J. Schacht, *An Introduction to Islamic Law* (Oxford 1964), p. 8. (Hereinafter, *Islamic Law*). Schacht's comment remains true today, seventeen years later. Schacht, of course, was referring to pre-Islamic *Arabian* terminology; but the same is true of talmudic terminology as it relates to Islamic law.

sources of talmudic law. *Qur'ān*, the Islamic scriptural revelation and first root of the law, corresponds with *miqrā*, the talmudic term for the Jewish scriptural revelation (*i.e.*, the Torah). *Sunna*, the Islamic oral tradition and the second root of the law, corresponds with *mišnāh* (the Mishnah), the basic source-text of the Jewish oral law. The third root, *ijmāʿ*, the consensus of the Muslim jurists, corresponds with the *ha-kōl* juristic consensus found in the second component of the Jewish oral law (the Gemara).[26] The fourth root is *qiyās*, the Muslim juristic logic. This, based originally on analogy (though it came to have a wider scope), corresponds with the talmudic *heqqēš*, reasoning by analogy. Each of these parallels will be examined in turn, to show the correspondence in each case at both the linguistic and the conceptual level.

1. *Qur'ān and Miqrā*

> Behold, we have sent it down, an Arabic *qur'ān*, that ye may understand.[27]

The first root of Islamic law is the Qur'an, the revelation of God to Muhammad as set down by scribes and edited by scholars. The name Qur'an comes from *qara'a*, a verb meaning "to proclaim" and by extension "to read aloud."[28] In the Qur'an, the word *qara'a* refers usually to Muhammad's revelation, but occasionally to the scriptures of other faiths.[29]

Both Jews and Christians possessed scriptures, known in Muhammad's day as the *miqrā* and the *qeryānā* respectively. The Torah was called *miqrā* because it was "proclaimed" by being read

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26. The Talmud consists of two parts: (1) the Mishnah, a compilation of rules of oral law edited by R. Judah the Prince about 200 A.D.; and (2) the Gemara (lit., "the Learning"), a further body of oral tradition elaborating the Mishnah; the Gemara was edited in the fifth and sixth centuries. In printed editions of the Talmud, these two components are interspersed, each separate rule of the Mishnah being immediately followed by the Gemara that pertains to it.

27. Qur'an, *sūra 12:2*.

28. Pickthall and others have translated *qara'a*, as used in the Qur'an, by "recite." But Hirschfeld, (*New Researches*,p. 19) had rightly pointed out the parallelism between the qur'anic *iqrā bismi rabbika* ("proclaim the name of thy Lord") in *sūra 96:1* and *wa-yiqrā be-shēm Adōnay* ("and he proclaimed the name of the Lord") in *Genesis 12:8*. The tendency of Arabists to translate *iqrā* as "recite" is due partly to the fact that while the Torah was always proclaimed by being *read* (so that *qārā* developed the secondary meaning of "read" which later entered Arabic), the Qur'an was and still is more often recited by rote. Nonetheless, it is clear that *qara'a* followed by *bi-* means "to proclaim" in this context.

29. Jeffery, *Vocabulary*, p. 233. See *sūras 10:94* and *17:93*. It also twice refers to the heavenly scripture which God will reveal at Judgment Day (*17:71* and *69:19*).

aloud (in weekly portions) during public worship.[30] This practice has been central in synagogue ritual since the time of Ezra in the fifth century B.C.[31] The Aramaic-speaking Christians called their scriptures *qeryānā*, "the reading" or "the lesson," for a similar reason. Though the term *qur'ān* is morphologically closer to *qeryānā* than to *miqrā* (a fact which may suggest Christian influence on Muhammad), the recitation of the Qur'an in the mosque is called *qirā'a*, the precise equivalent of Hebrew *qerī'ā*, "public Torah-reading" (a fact which may argue for Jewish influence). Either way, in coining the term *qur'ān*, Muhammad used Hebrew/Aramaic terminology; for *qara'a* is not a native root in South Semitic (Arabic), but was "borrowed" from North Semitic (Hebrew or Aramaic) because of the earlier development of literacy among the northern Semites.[32]

The Prophet's repeated use of the expression "an Arabic *qur'ān*"[33] shows the importance he attached to the possession of an indigenous scripture which would give the new faith the same legitimacy as its mother and sister faiths.[34] Internal textual evidence shows that Muhammad equated the Qur'an, as a book of religious and legal guidance for Muslims, with the Torah of the Jews and the Gospel of the Christians.[35] Descriptions of Muhammad's call, in the

30. H.J. Kasowsky's talmudic concordance, *Ōẓar Leshōn Ha-Talmūd* (Jerusalem, 1954-1978, hereinafter *Concordance*), lists hundreds of entries under the heading *miqrā*. For present purposes, the most significant is the statement in the first chapter of the Talmud (*b. Berākōt 4a*) that "Torah is *miqrā*" (*i.e.*, that the term *miqrā* signifies the written law).

31. *Nehemiah 8:1-8:* "And ʿEzra opened the Book in the sight of all the people . . . and they read from the Book, from the law of God, expounding it . . . and they made the people understand the *miqrā* (reading)." The connection between *qur'ān* and *miqrā* has been noted by many bible scholars, among them Geiger, *Judaism and Islam* p. 44; Hirschfeld, *New Researches*, p. 19 ff; J. Slotki, *Daniel, Ezra and Nehemiah* (London 1951) p. 230.

32. Jeffery, *Vocabulary*, p. 33; see also note 40 below.

33. *Sūras 12:2, 42:7, 43:3.* See also similar locutions like "in a pure Arabic tongue" (*16:103*) or "a wise judgment in Arabic" (*13:37*).

34. By the second century of Islam (as noted by Jeffery, *Vocabulary* p. 5), Muslim scholars had begun to interpret "an Arabic *qur'ān*" literally. Thereafter, it became an article of faith to deny the presence of foreign words (including Hebrew/Aramaic) in the Qur'an. This was done to conform with the dogma that Qur'an was unique and original, being the direct word of God spoken in Arabic through Muhammad. Nonetheless, as Jeffery has shown and as is universally acknowledged, the Qur'an contains hundreds of foreign words. It is problable that the phrase *qur'ān ʿarabī*, which can also be translated "an *Arab* Qur'an," was actually intended to signify a scripture *revealed to the Arab people*, just as earlier scriptures had been revealed to other peoples.

35. *Sūra 5:44-46:* "Behold, we sent down the Torah, wherein is guidance and light . . . and we bestowed on [Jesus] the Gospel, wherein is guidance and light confirming that which was before it in the Torah." See also *sūra 9:111*, which juxtaposes Torah, Gospel and Qur'an.

Qur'an itself and in the oral tradition, closely echo biblical accounts of the call of the prophets.[36]

The notion of the qur'anic revelation as the primary source of a law which governs all aspects of life, religious and secular, owes more to the Jewish than to the Christian perception of scripture. The Torah was always viewed as the primary source of Jewish law, whereas Christians were not required to observe most Mosaic provisions, which were considered abrogated by the coming of Christ.

The linguistic and conceptual parallel between *qur'ān* and *miqrā* as divine revelation was clear both to Muslims and to their Jewish neighbors. Since Arabic was their mother-tongue, Jewish scholars in Muslim lands often wrote in that language, or translated their Hebrew writings into Arabic, even when expounding the Hebrew scriptures.[37] Thus, the tenth-century scholar Saʿadya Gaʾōn, in his *Treatise on the Seventy Hapax Legomena of the Miqrā*, even uses the term *qur'ān* to denote the Jewish scripture![38]

The correspondence between *qur'ān* and *miqrā* as the first root of law is seen also in parallel terminology for the two revelations as Holy Writ. The Qur'an frequently calls itself *al-kitāb* (literally "the Writing") and uses the same term to denote the *Hebrew* scripture.[39] Here, too, Arabic *kitāb* is originally derived from Hebrew/Aramaic.[40] The word *kitāb* actually appears for the first time in the Qur'an, which was the first *written* Arabic literature;[41] but the Hebrew Torah is referred to throughout the Talmud as *ha-kātūb*, "scripture" (literally "that which was written"). It is also called the

36. In particular, the use of *qara'a* in the tradition echoes the language of the call of Isaiah, while the Prophet's claimed reluctance to serve evokes the story of Moses. Thus, *sūra 96:1:* "Proclaim (*iqrā*) the name of thy Lord . . . " echoes *Isaiah 40:6:* "A voice says, Proclaim! (*qerā*)." Muslim tradition relates that Muhammad answered: *mā aqra'u*, "what shall I proclaim?" The tradition further claims that Muhammad modestly insisted that he was "not a reciter" — which evokes Moses' response at the burning bush, *Exodus 4:10:* "I am not a man of words."

37. Goitein, *Jews and Arabs*, p. 132. Jeffery, *Vocabulary*, p. 25, n. 5, cites a Muslim tradition that the Medinan Jews read the Torah in Hebrew but translated the reading into Arabic: Ṭabarī (d. 923), *Jāmiʿ al-Bayān fī Tafsīr al-Qur'ān* (Cairo 1903, hereinafter *Tafsīr*) 21:4.

38. Saʿadyā (d. 942) was Gaʾōn (president) of the talmudic academy at Sura. The Arabic title of the book is: *Kitāb al-Sabʿīn Lafẓa min Mufradāt al-Qur'ān.*

39. *E.g., sūra 17:2:* "We gave Moses the *kitāb*, appointing it as guidance for the Children of Israel." Cf. *Sūra 10:94:* "the *kitāb* that was before thee" (referring to the Torah).

40. Jeffery, *Vocabulary*, p. 248, states that the root *k-t-b* is "a N. Semitic development and found only as a borrowed form in S. Semitic." Goldziher notes that the Arabs of Medina learned writing from the Jews. *Muslim Studies* (tr. Barber and Stern, London 1967) vol. 1, p. 106. (Hereinafter, *Studies*).

41. Pre-Islamic poetry existed in oral form, but was not written down until after the Qur'an.

Torah *she-bi-ketāb*, "the written law," (as distinct from the Torah *she-b ᶜal-peh*, "the oral law").[42] Thus, the term *kitāb* (which originally signified not any book but specifically the Qur'an) is derived linguistically and conceptually from Hebrew *ketāb*, *kātūb* (possibly by way of the Syriac *ketābā* as likewise used to denote the Christian scriptures). There is an additional dimension to the term *kitāb*: it is morphologically equivalent to Hebrew/Aramaic *ketāb*, meaning a "legal decree."[43] In using *kitāb* to denote the Qur'an, the Prophet may have intended to stress its character not just as a *book* (it was not compiled until after his death) but rather as a *book of divine law*.

The parallel between *qur'ān/kitāb*, the Jewish revelation, as the first root of Islamic and talmudic law respectively, is sufficiently clear. We turn now to the second root of the law.

2. *Sunna and Mišnāh*

> [The Caliph ᶜUmar] ordered it burnt, saying: "What! a *mathnāh* like the *mathnāh* of the Jews?"[44]

The second root of Islamic law is the Sunna, a body of oral tradition claimed to have been handed down from the Prophet or his contemporaries in an unbroken chain of transmission. Reports of the words and acts of the Prophet, his Companions and their Successors[45] constitute the primary extra-qur'anic source of islamic law.

The term *sunna* is pre-Islamic; it previously denoted Arabian customary law based on tribal practice handed down from time immemorial. The term comes from a semitic root whose possible original meaning was "to repeat"[46] and which came by extension to

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42. Kasowsky, *Concordance* (s.v. *medabbēr*) lists hundreds of entries for *ha-kātūb medabbēr*, "Scripture is speaking of . . . " For *tōrāh she-bi-ketāb*, see *b. Šabbāt 31a*.

43. *Cf. ketāb* in *Esther 4:8, 8:8* and *II Chronicles 2:10, 35:4*, where the word means the prescript or edict of a king. See Jeffery, "The Qur'ān as Scripture," 40 *Muslim World* (1950), pp. 47 ff.

44. Ibn Saᶜd (d. 845), *Kitāb al-Ṭabaqāt al-Kabīr* (Cairo 1905-40) vol. 5, p. 140.

45. The "Companions" were members of the Prophet's family and his principal supporters (including the first four Caliphs who followed him: Abū Bakr, ᶜUmar, ᶜUthmān and ᶜAlī, who reigned successively from 632-61). "Caliph" is an Anglicization of *khalīfa*, lit. "a replacement" or "substitute" (for the Prophet). "Successors" means the next generation who received the tradition directly from the Companions.

46. The word *s-n-n* as a noun in semitic languages means "tooth." The original meaning of the verbal root is not clear, but one theory is that it meant "to repeat" (just as teeth are "repeated" in the two jaws). Certainly the Arabic noun *sunna* and Hebrew verb *šinnen* (discussed below), were both traditionally interpreted to refer to

mean "a path marked out by repeated treading,"[47] that is to say, the inculcation of tribal customs into the minds of successive generations.[48] Such inculcated traditional practices eventually crystallized into customary law.

With the rise of Islam, *sunna* came to mean specifically *Islamic* tradition (which included from the first a great deal of pre-Islamic *sunna*). Initially, each of the many early law schools formed its own independent chain of tradition: later, however, *sunna* came to mean more specifically the "practice of the Prophet" as transmitted in *ḥadīth* reports.[49] The Prophet's example, seen as the ideal path for Muslims, came to be known as the *sharīʿa* ("way").[50] But the proliferation of schools produced conflicting traditions based on differering local customs, which led to inconsistencies as each school claimed to follow the "*sunna* of the Prophet." It was these inconsistencies which led the jurist Shāfiʿī (whose work is discussed in Part Two) to insist on the doctrinal need to reconcile conflicts into a single, unified body of law, the Sunna of Islam.[51]

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something that is done "repeatedly." The confusion is compounded by the existence of two more semitic roots: *th-n-y/š-n-y*, "to be second, doubled, repeated" and *s-n-y/š-n-y*, "to change or recur cyclically" (like the seasons of the year, cf. Arabic and Hebrew *sana/šānāh*, "year"), which clearly also has a sense of "repetition." In Hebrew, all three of these roots look identical in some forms and were thus treated as linguistically related in popular etymology and exegesis. See note 52 below.

47. Ṭabarī, *Tafsīr*, vol. 2, p. 885. Margoliouth's attempt to derive *sunna* from *istanna* "to gallop," ("Omar's Instructions to the Kadi," *J. Royal Asiatic Soc.* (1910) p. 307-26, at p. 314) seems to put the cart before the horse, since *istanna* is itself derived from *s-n-*

48. Latin *inculcare* (from *calx*) literally means "to trample with the heel."

49. A *ḥadīth* is an oral tradition describing words or acts of the Prophet, which were held to express or imply a rule of *sunna*. The verb *ḥaddatha* came to mean "to report a *sunna* orally" (*cf.* the Hebrew *tōrāh she-bʿal-peh*, "law transmitted by word of mouth." *ḥadīth* is cognate with Hebrew *ḥādāš*, "new," hence *hiddūš*, denoting since mishnaic times a "new" rule of law arrived at by interpretation of texts. This may be compared with the Roman-law *novella* (literally "something new"). The linguistic and conceptual relationships of *novella, hiddūš* and *ḥadīth* may be worth exploring.

50. Cf. the use of "the Way" in other religions, notably Hinduism, Buddhism and Taoism.

51. Sunna (non-italicized) denotes the whole corpus of fully-developed Islamic oral law. This consists of rules gleaned from thousands of *ḥadīth* anecdotes which closely resemble in style and content the Jewish aggadic and midrashic literature. The Hebrew Mishnah is a code containing only the rules without the aggadic anecdotes. (The aggadic element is far more pronounced in the Gemara). Thus the mishnaic rules correspond to the Sunna rules found in the *ḥadīth* literature. *sunna* and *mišnah* are italicized here when referring to them as abstract concepts or roots of law rather than a corpus of legal rules.

A comparative approach sheds some light on the antiquity of the term *sunna*. In its primary sense of "tribal custom," the word has a direct linguistic and conceptual parallel in the Torah which seems to have gone unremarked. The word appears in the context of an exhortation to the Children of Israel to inculcate (*šinnēn*) their creed and customs to their descendents.[52] The Hebrew verb *šinnēn* and the Arabic noun *sunna* stem from a common semitic root; its occurrence in the text of *Deuteronomy* (dating from the seventh century B.C.) shows the great antiquity of the pre-Islamic notion of *sunna* as tribal practice. Jewish emphasis on the inculcation of tradition is underscored by the sages' selection of this very passage (known from its opening words as the *Shemaᶜ Yisrāēl*) for twice-daily recitation by observant Jews. A similar approach is seen in a tradition, recorded by a tenth-century Muslim exegete, that a devout Muslim dying in the year 82 of the *hijra*[53] (about 800 A.D.) bade his sons on his deathbed to "read the Qur'an *and teach the Sunna*."[54]

The equivalence of biblical *šinnēn* and pre-Islamic *sunna* seems clear. With the Sunna of Islam, however, the analogy extends still further; the Islamic Sunna is conceptually identical with the Jewish Mishnah. The Mishnah was an early (second century A.D.) codification of the rules of the Jewish oral law. The word *mišnāh* (conceptually related to *šinnēn* and hence to *sunna*) literally means "repetition" and reflects the practice of teaching the oral tradition by rote, during the centuries before it was committed to writing. Thus Sunna, in the sense of rules of law extracted from the *ḥadīth* reports by the Muslim jurists, parallels Mishnah, the corpus of rules of oral law handed down by the Jewish sages. The correspondence is aptly illustrated by the dying Muslim's injunction, just cited, to "*read* the Qur'an and *teach* the Sunna." This emphasis on a dichotomy between the written law, which should be *read*, and the oral law, which must be *taught* (and learned) by constant *repetition*, echoes the talmudic coupling of *miqrā u-mišnāh* (Torah and Mishnah; literally "that which is *read* and that which is *taught by rote*") as well as the

52. *Deuteronomy 6:7; we-šinnantām le-bāneikā*, "and thou shalt inculcate [God's laws] to thy children." *šinnēn*, "inculcate by repetition" appears as a verb. The corresponding noun *šinnūn*, exists but is scarcely used, because early conflation of *š-n-n* with *š-n-y* (see note 46) produced the noun *mišnāh* (Mishnah).

53. The Muslim calendar is reckoned fro 622 A.D., the year of the *hijra* (variously translated "flight" or "emigration") of Muhammad from Mecca to Medina. Since this calendar is lunar, but without the seasonal compensation provided by intercalating an occasional leapmonth (as in the Jewish calendar), one hundred Muslim years correspond to about ninety-seven solar years. (The Qur'an abolished the pre-Islamic Arabian leapmonth for reasons which, though interesting, are beyond the scope of this study).

54. Ṭabarī, *ta'rīkh al-Rusul wa'l-Mulūk*, vol. 2, p. 1083 (Leiden 1885).

common talmudic phrase *qōrē we-šōneh*, "one reads [the Torah] and repeats [the Mishnah]."[55]

When *sunna* came to mean the practice of the Prophet *as the norm for establishing extra-qur'anic legal rules*, Muslim jurists began to trace these rules back to the Prophet as far as possible in unbroken chains of tradition. This was precisely what talmudic sages had done with the Jewish oral law; the second-century editors of the Mishnah had made a point of including a "blanket" chain of tradition all the way back to Moses, specifying the generational links from Sinai to the editing of the Mishnah.[56] Although the Sunna is far more closely linked by tradition to the personal life of Muhammad than is the Mishnah to the life and thought of Moses, the principle is the same. As Wansbrough has said: "Recognition of the (prophetical) Sunna as Mishnah may be regarded as yet another element in what could be described as the 'Mosaic syndrome of Muslim prophetology.' "[57]

There are strong indications that the analogy between Sunna and Mishnah was perceived by Muslim jurists. As their tradition grew in volume, the question arose whether the Sunna should be written down—the very same question faced by the Jews centuries before, when the need to preserve the burgeoning tradition forced a reluctant decision to write down the Mishnah.[58] A similar Muslim reluctance is seen in the tradition, reported by the ninth-century historian Ibn Sa'd, that the Caliph 'Umar (634-644) expressly disapproved the literary fixing of the Sunna, ordering a written collection to be burnt with the comment that Muslims did not need "a [written] *mathnāh* like the *mathnāh* (Mishnah) of the Jews."[59]

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55. Kasowsky, *Concordance, s.v., miqrā* (2): *e.g., b. Sukkā 25a; b. Bābā Batrā 134a; b. Ṣōṭāh 44a; b. Qiddūšīn 30a;* and *s.v. qōrē: e.g., b. Berākōt 4b:* "If he usually reads [Torah], then let him read (*qōrē*); if he usually learns [Mishnah] then let him learn (*šōneh*)."

56. *m. Ābōt 1:1*: "Moses received the Torah from Sinai and transmitted it to Joshua, and Joshua to the Elders, and the Elders to the Prophets, and the Prophets transmitted it to the Men of the Great Synagogue . . . " (The tractate goes on to add further names of transmitters through the generations down to the redaction of the Mishnah).

57. J. Wansbrough, *Qur'anic Studies* (Oxford, 1977), p. 57. See also Rosenthal, *Judaism and Islam* (note 11 above), p. 34.

58. The reluctance stemmed from the prohibition in *Deuteronomy 4:2*: "Ye shall not add to the word that I commmand you . . . " the problem was solved by regarding Mishnah as interpretation rather than new law.

59. See notes 44 and 46 above. Arabic *mathnāh* is a direct transcription of *mišnāh*, but substitutes *th*, the Arabic equivalent of Hebrew *š*. This substitution may reflect the influence of Aramaic *mathnītā* (Mishnah). Muslim tradition was sometimes more favorable to what it called the "Jewish *ḥadīth*" stating: "One may report *ḥadīth* of the Children of Israel without objection." Abū Dāwūd, *Sunan*, vol. 2, p. 82; al-Tirmidhī, *Ṣaḥīḥ*, vol. 2, p. 111.

Another tradition claims that the Prophet himself forbade the writing down of the Sunna[60] (a report which evokes the earlier Jewish interdiction on writing down the oral law). However, in Islam as in Judaism, that reluctance was overcome by the impossibility of retaining by heart the whole of the proliferating tradition.[61]

Finally, in comparing the Sunna to the Mishnah, we find a fascinating and seemingly unremarked coincidence: *both* systems of oral tradition are known as the *Six Books*. At the time of its editing in the second century, the Mishnah was divided into six sections according to subject matter. The *Six Orders of the Mishnah* are commonly referred to in the Talmud simply as the *Six Orders* (*i.e.*, Six Books).[62] In the case of the Sunna, however, the designation of precisely six books has no inherent reason. There are about a dozen early collections of *ḥadīth* (all with approximately the same contents, internally divided by subject matter); but of these collections, only six seem to have been canonized.[63] These six are known as *al-kutub al-sitta*, the *Six Books*. More precisely, they are the *Six Books of the*

60. Aḥmad b. Ḥanbal (d. 855), *al-Musnad* (Cairo, 1895) vol. 3, p. 26. Goldziher maintains that such traditions were fabricated by factions which wanted to be "hampered in the free development of the law by as few *leges scriptae* as possible." *Muslim Studies*, vol. 2, p. 181. He mentions, however (at vol. 2, p. 197) an early written code, containing (like the Mishnah) the rules without the aggadic *ḥadīth* anecdotes and called *Kitāb al-Sunan fī'l-Fiqh*, "Book of the Sunna-rules in the Law," ascribed to Makḥūl (d. 735).

61. Margoliouth states that, even after the Sunna was reduced to writing, it was "a token of sanctity never to be seen employing written material, other, of course, than the Koran; but in the case of that work greater merit was acquired by *reading* than by *reciting*." *The Early Development of Mohammedanism* (London, 1914) p. 68 (emphasis added). This description precisely parallels the Jewish development : it is known that many *tannāīm* (mishnaic sages) kept notes but concealed them while teaching. In reading from the Torah, on the other hand, one must *read* from the scroll even if he knows the text by heart. As noted above (note 28), Islam never made reading the Qur'an actually obligatory; because of the low level of literacy among most Muslim peoples until recent times, it was thought better that people should learn to recite the qur'anic passages by heart than not at all.

62. *E.g., b. Ketubbōt 103b; b. Bābā Meẓia 85b*. To this day, the complete Talmud, which follows the original sixfold division of the Mishnah, is colloquially known as the *ShaS*, a mnemonic formed by the initial letters of *šiššā sedārīm*, "Six Orders." The mnemonic for the orders is *ZeMaN NeQaT*, representing: (1) *Zerā'īm*, laws of agriculture; (2) *Mō'ēd*, laws of sabbath and festival observance; (3) *Nāshīm*, laws concerning women (marriage, divorce, etc.); (4) *Nezīqīn*, laws of civil damages (torts, contracts, property, evidence and procedure); (5) *Qodāshīm* laws of sacred things (sacrifice, divine service, etc.); and (6) *Ṭohārōt*, laws of ritual purity.

63. The six canonical collections are discussed in Goldziher, *Studies*, vol. 2, pp. 229 ff. and in W. Graham, *Divine Word and Prophetic Word in Early Islam* (The Hague, 1977, hereinafter *Divine Word*), pp. 83-84. The earliest, most popular (and best known in the West because it has been translated into French) collection of *ḥadīth* is the *Ṣaḥīḥ* of al-Bukhārī (d. 870), tr. O. Houdas and W. Marçais, as *Les Traditions Islamiques* (Paris, 190314).

Sunna; indeed, three of these collections, containing only the rules without the anecdotes from which they are gleaned, are actually called *Sunan* (plural of *sunna*), meaning "rules of the Sunna," just as individual rules of the Mishnah are known as *mišnāyōt* (plural of *mišnāh*). The coincidence in the number seems at first sight pure accident; but it is clear that there was no intrinsic reason to restrict canonization to precisely six of the Sunna collections. Furthermore, there was acrimonious dispute as to exactly *which* six were to be canonized.[64] One cannot escape the conclusion that, for some reason quite unrelated to their contents, there was a sense that six was the "right" number for books of the Sunna. Moreover, Goldziher notes that this insistence on restricting the number to six is found only in *eastern* (and not western) Islam—that is, in precisely the geographic region where ninth-century Muslims were most likely to know about the Jewish Mishnah and its division into six books.[65] The parallel between the Six Books of the Sunna and Six Books of the Mishnah is thus probably no accident; it certainly invites further exploration.

There is, then, ample evidence that as the corpus of Islamic oral law developed, the parallel between Islamic Sunna and Jewish Mishnah as the second root of the law was perceived by the Muslim jurists. But one important factor was still missing from this equation. As we shall see in Part Two, the missing factor was to be supplied by Shāfiʿī's postulation of the divinity of the Sunna—a doctrine which would make even stronger the analogy between Sunna and Mishnah.

3. *Ijmaʿ and the Hā-Kōl Consensus of the Gemara*

> [Ijmāʿ] is a regular source of Rabbinical law, the phrase 'all our Rabbis hold' being common in the Talmud.[66]

The third root of Islamic law is *ijmāʿ*, consensus.[67] This means consensus on rules of law claimed to be derived from either the Qur'an or the Sunna. *Ijmāʿ* may take one of two forms which are

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64. Goldziher, *Studies*, vol. 2, pp. 240-43. Graham, *Divine Word*, pp. 83-84.

65. Goldziher, *Studies*, vol. 2, p. 243. Curiously, Goldziher fails to note the coincidence of the Six Books. This may be because he had ranged himself on the side of those who rejected any possible connection between Sunna and Mishnah, a theory which he calls "this fable" in a polemical passage at vol. 2, p. 194. He does not explain why he rejects the connection.

66. Fitzgerald, "Alleged Debt" (note 15 above) at p. 97.

67. The technical term *ijmāʿ* comes from a root *j-m-ʿ*, signifying "the totality," "everybody." The verb *jamaʿa* means "to bring together" and in the fourth conjugation, *ajmaʿa*, "to agree together." Thus ijmāʿ means literally "unanimous agreement" or "total consenus."

analytically distinct. The distinction, however, is not always spelled out in contemporary discussions of the nature of *ijmāᶜ*, a fact which has bred much confusion.[68]

The first (and theoretically primary) connotation of *ijmāᶜ* is *ijmāᶜ al-umma*, "consensus of the people."[69] This refers to cases where a customary rule is adopted by common consent, even though the rule is not to be found either in the Qur'an or in the Sunna as transmitted in the *ḥadīth* reports. The second type of *ijmāᶜ* (of far greater practical importance once a systematic Islamic jurisprudence began to develop) is *ijmāᶜ al-ᶜulamā'* "consensus of the scholars."[70] This type of consensus is rarely unanimous in practice; it really consists of an agreement to abide by the majority view (as in the Anglo-American appellate court system). However, during the early days of Islamic law, the consensus of the scholars seems to have been treated as unanimous, its actual majoritarian character being glossed over or ignored; later, we find Shāfiᶜī complaining that the term *ijmāᶜ* (literally "the agreement of *all*") is technically inappropriate to describe the consensus of the scholars.[71]

The pretended unanimity of the scholarly consensus was a response to a serious doctrinal problem, namely, the validity of rules which were not universally accepted. This difficulty, which poses no problem for western lawyers accustomed to the notion of lawmaking by a democratic majority, stemmed from the theocratic nature of Islamic law. In that system, as we noted, all law comes from God, so all legal rules are supposed to be either found in or derived from, the Qur'an or the Sunna. Theoretically, there should be no disagreement. In practice, however, the early proliferation of schools over a wide geographic area in the wake of the Muslim conquest led to each school's developing its own *ijmāᶜ*, claimed as universal but really based on purely local tradition.[72] The only school which could openly

68. See note 142 below.

69. *umma*, which came to signify the religious community of Islam, originally meant "clan" or "tribe." The word comes from *umm*, "mother" and reflects an earlier time when descent among the Arab nomads was matrilineal. It is significant that the Hebrew term *umma*, occurring twice in the Bible, both times denotes non-Hebrew *nomadic* clans. (The Torah was written down after the Israelites had settled in Canaan and begun to record their own descent *patrilineally*, as customary among sedentary peoples). In *Genesis 25:16*, *ummā* refers *specifically* to the descendants of Ishmael, who (in a Jewish tradition later adopted by the Muslims) is considered the ancestor of the Arab people.

70. *ᶜulamā'* (often rendered *ulema*) pl. of *ᶜālim*, "a learned person." *ᶜilm* means "sacred learning or knowledge." (*Cf. talmūd* and *gemārā*, which are respectively the Hebrew and Aramaic words for "sacred learning.")

71. See below, note 141 and text thereto.

72. Coulson (*History*, pp. 48-49) notes some of the conflicts that resulted from the application of local customary law in widely disparate geographic regions. Such sociocultural explanations however, are rejected by orthodox Islamic doctrine, which

concede the local character of its *ijmāᶜ* was the Malikī school of Medina, which, since the Prophet had lived and died there, could plausibly claim local tradition as definitive of the "practice of the Prophet" and thus of the correct rule of Islamic law on any point.[73] But while the Malikī school cited only Medinan authorities, other schools (notably the Ḥanafī school of Kufa) could not acknowledge the local character of their *ijmāᶜ*, for to do so would cast doubt on the doctrine of direct transmission from the Prophet (particularly where Kufan tradition conflicted, as often happened, with the Medinan rule).[74] For this reason, the Iraqi schools carefully preserved the fiction of a universal consensus.[75] In reality, the scholars at Kufa, Medina and elsewhere followed local customary law, which sometimes coincided but often did not. In an empire extending by 750 A.D. from the Indus to the Pyrenees and from Ethiopia to Samarkand, wide differences in local custom made a pan-Islamic consensus impossible.

A similar problem, though on a smaller scale, had arisen for Jewish law at the time of the widespread dispersion of the Jews following their exile from Judaea by Rome in the first century A.D. Even before the Exile, there had been a number of schools with divergent traditions, the most famous being those of Hillel and Shammai. That particular problem was later solved by recourse to a tradition that God had spoken from Heaven directing that in case of conflict, the school of Hillel must be followed.[76] The editing of the Mishnah in the second century brought a degree of uniformity to the oral law; and the subsequent efforts of the Babylonian sages to reach consensus wherever possible in their elaboration of the Mishnah

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ascribes divergences in the rules of Islamic law to "the mercy of Allah." *Cf.* the talmudic explanation for conflicts between early schools of Jewish law: "Both these and those [rules] are the words of the living God." *b.* ᶜ*Ērūbīn 13b.* (See notes 133-34 below and text thereto).

73. Thus, the jurist Mālik (d. 795) often says: "This is what the scholars *in our city* have always held." Mālik, *al-Muwaṭṭa'* (ed. Cairo, 1951) vol. 2, p. 271 (emphasis added).

74. Schacht (*Origins*, p. 84) claims that the "provincialism" of Medina was originally a "crude remnant of the original geographical character of the ancient schools'" and that the city's claim to be the true home of the Sunna was made later, to justify the Mālikī school's reliance on local *ijmāᶜ*. Schacht further argues that the Iraqi schools' claim to represent a universal consensus reflects "a more highly developed [legal] theory." If so, it may well be significant that the Iraqi schools (especially Kufa) were situated close to the talmudic academies of Sura and Pumbedita, where the notion of universal consensus in Jewish law had previously developed.

75. Shāfiᶜī notes that the Iraqi schools habitually speak of "the consensus of the scholars *in all countries.*" *Kitāb al-Umm* (ed. Cairo, 1904-08) vol. 7, p. 256 (emphasis added). Schacht, *Origins*, p. 85.

76. *b.* ᶜ*Ērūbīn 13b.* "Both these and those are the words of the living God, but the *halākā* follows the School of Hillel."

testifies to the continuing emphasis placed on the reconciliation of conflict. This was the result of doctrinal considerations of the same kind that later would move Shāfiʿī to insist on the unification of Islamic legal tradition.

From a comparative viewpoint, both kinds of Islamic consensus (that of the people and that of the scholars) have their counterparts in talmudic law. As Wansbrough has noted, the basic distinction between "consensus of the people" and "consensus of the scholars" is expressed in the talmudic distinction between *minhāg* (custom followed by common consent, in a matter where no settled rule appears in either the Torah or the Mishnah) and *halākā* (the rule of Jewish law as laid down by the talmudic sages).[77] The *minhāg* of the people was considered an important source of legal authority; indeed, where it was universal, it may be regarded as the third root of Jewish law in much the same manner as was claimed by Shāfiʿī for the *ijmāʿ* of the people. The Talmud states expressly that, in cases where neither written nor oral law supplies a rule, one should "go out and see what the people do"[78] and let the popular consensus determine the rule. The Talmud's rationale for the people's authority ("Leave it to Israel; if they are not prophets, they are still the children of prophets")[79] was, as we shall see, very similar to that later offered by Shāfiʿī for the authority of the Muslim community in establishing legal rules.[80]

As for the *ijmāʿ* of the scholars, this too had its talmudic counterpart. The rulings in the Gemara are expressed in the form of a consensus reached after much deliberation. (It is probable that in many cases the stated rule is a later interpolation by the *sabōrā'īm*, "explicators" of the sixth and seventh centuries; but we are here concerned only with the text as it would appear to a reader in the eighth or ninth century).

Talmudic rulings are usually introduced by one of two expressions. The first, used when formally recording a consensus as unanimous, is the phrase *dibrei ha-kōl* (literally, "the words of all"), signifying "the unanimous consensus." This phrase, which appears hundreds of times throughout the Talmud,[81] is presumably the one rendered by Fitzgerald, in the citation at the head of this section, as "*all* our Rabbis hold . . . " The key word here is *ha-kōl*, "everybody." This is the precise semantic (though not etymological)

77. Wansbrough, *Qur'anic Studies*, p. 57. On *minhāg* as a source of law, see discussion by M. Elon in M. Elon (ed.), *The Principles of Jewish Law*, Jerusalem, 1975, cols. 91 ff.

78. *b. Berākōt 45a.*

79. *b. Pesāḥīm 66a.*

80. See below, text accompanying note 138.

81. Kasowsky, *Concordance*, s.v. *dābār: dibrei ha-kōl.*

equivalent of the Arabic *al-jamīᶜ*, "everybody," from which the term *ijmāᶜ* is derived.[82] Thus, the consensus defined by the term *ijmāᶜ* is conceptually equivalent to that expressed in the Talmud by the word *ha-kōl*[83] To look further afield, and speculate with Goldziher and Schacht on the possibility that the Islamic consensus was derived from what Goldziher called "the Roman law *opinio prudentium*"[84] seems, as Fitzgerald pointed out, superfluous. Goldziher was, however, correct in saying that "the Muslim lawyers in Syria and Mesopotamia who began to elaborate an Islamic legal system in the first half of the second [Islamic] century did not perform a labour which (as Renan thinks) grew out of 'Arab genius.' "[85]

Whether the consensus formally expressed by *dibrei ha-kōl* was indeed unanimous is not important here; what matters is the *formal* appearance of the text to a seventh- or eighth-century reader. Talmudic consensus was not, however, recorded as unanimous in all cases. The hundreds of rulings described as *dibrei ha-kōl* are quantitatively matched by hundreds more, which explicitly record a "majority" opinion with a named dissenter, thus: "Rabbi X holds [thus and so], but the sages rule [*ḥakāmī ōmerīm*] as follows . . . [86] The phrase, "the sages rule," appears formally to signify a majority ruling. (Once again, we bear in mind that this may have been no more than an editorial device to establish a particular ruling as *halākā*.

82. See note 67 above. In the case of *ijmāᶜ*, unlike the other three roots of the law (*qur'ān*, *sunna* and *qiyās*), there is no *etymological* correspondence between the Hebrew and Arabic terminology. There is, however, a precise *semantic* correspondence between Arabic *al-jamīᶜ* and Hebrew *ha-kōl* as nouns meaning "everybody."

83. The parallel between the Islamic *ijmāᶜ* and the talmudic consensus was noted by Rosenthal, *Judaism and Islam*, p. 35. He does not, however, explore the linguistic correspondence.

84. Goldziher, *Studies*, vol. 2, p. 79. P. Crone and M. Cook, *Hagarism* (Cambridge, 1977), p. 151 point out that the expression *opinio prudentium* does not actually appear in classical Roman law texts, but seems to have been coined by Goldziher. It seems to the present writer that Goldziher may have conflated two genuine Roman law terms, *opinio omnium* and *responsa prudentium*. The close correspondence between these two terms and the two talmudic terms *dibrei ha-kōl* (note 81 above) and *dibrei ḥakāmīm* (note 86 below) is almost certainly no accident, since *ha-kōl* = *omnes* and *ḥakāmīm* = *prudentes*. The Roman consensus may well have influenced the talmudic consensus, with which it seems to have developed *pari passu*, the editing of the Mishnah coinciding with the publication of the *Institutes of Gaius* in the second century and that of the Gemara with the *Institutes of Justinian* in the sixth. Goldziher's spurious *opinio prudentium* may have been a subconscious expression of his eagerness to show a Roman-law origin for the Islamic ijmāᶜ *al-ᶜulamā'*. Ironically, the phrase he coined is far closer in meaning to the talmudic *dibreiḥakamīm* (which probably *did* derive from Roman law) than to *ijmāᶜ al-ᶜulama'* (which, as I argue later, probably did not).

85. *Studies*, vol. 2, p. 80.

86. Kasowsky, *Concordance*, s.v. *ḥākām: wa-ḥakāmīm ōmerīm*. A related expression, *dibrei ḥakāmīm*, "the words of the sages" is also found in the Talmud, though less frequently.

What matters here is the *formal* appearance of the text to a seventh- or eighth-century reader, who would perceive the ruling in question as a majority ruling). Thus, unlike the early Muslim scholars, who would not admit to a lack of unanimity, the talmudic sages were frank to concede that not all consensus was or need be unanimous. Indeed, the first chapter of the Talmud states the rule that in cases of dispute "the *halākā* follows the majority."[87] Islamic law, by contrast, had to await the coming of Shāfiʿī before it would acknowledge that the scholarly consensus was rarely unanimous and accept the validity of a rule based on a majority view.

4. *Qiyās and Heqqēš*

> "Study resemblances and parallels, then analogize (*qis*) cases." — *ʿUmar's Instructions to the Qāḍī*.[88]

The fourth root of Islamic law is a system of logical reasoning called *qiyās*. Although *qiyās* came to be called the fourth root only in the classical, post-Shāfiʿīan period (Shāfiʿī himself called *qiyās* a "branch" rather than a "root" of jurisprudence), the term itself is pre-Shāfiʿīan. We first find the verb *qis*,"analogize" in the earliest known post-qur'anic legal text, a document called the *Instructions of ʿUmar b. Khaṭṭāb to the Qāḍī Abū Mūsā al-Ashʿarī*. Its contents are recorded in texts which, though dating from the late ninth century, trace the document back to the early eighth century.[89]

Qiyās, "deduction by analogy" originally signified the derivation of rules of law by analogy with earlier rulings found in either the Qur'an or the Sunna. The oldest juristic analogies were rather crude, for instance an attempt to fix five *dirhams* (by analogy with the five fingers) as the minimum value of stolen goods which could incur the qur'anic penalty of amputation of the hand.[90] This argument, however, failed to dislodge existing custom, which dictated ten *dirhams* at Kufa and three at Medina. One early *qiyās* which succeeded was the fixing of the minimum bride-price by analogy with these same sums, on the theory that if a thief must steal

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87. *b. Berākōt 9a*: "[In a dispute between] one and many, the *halākā* follows the many."

88. Jāḥiẓ (d. c.870) and later traditionists record a document called *The Instructions of ʿUmar b. Khaṭṭāb to the Qāḍī Abū Mūsā al-Ashʿarī*. The ascription may be apocryphal, since the traditionists themselves trace the document only to the beginning of the eighth century, while the Caliph ʿUmar died in 644. Nonetheless, the document, whatever its provenance, is the oldest known Islamic legal material except the Qur'an itself.

89. D.S. Margoliouth, "Omar's Instructions to the Kadi," note 47 above (hereinafter, "Instructions").

90. Schacht, *Origins*, p. 107.

ten (or three) *dirhams* before losing his hand, a bride should receive at least an equal sum before she need give up her virginity.[91] In time, analogies became more sophisticated and the art of *qiyās* developed into an elaborate system which included many other kinds of rhetorical argument besides analogy. Shāfiʿī, as we shall see, is credited with introducing several rules of rhetoric which bear a close resemblance to the rules of talmudic exegesis.

Qiyās is among the few phenomena of Islamic law whose pre-Islamic origins have been the subject of speculation by comparative lawyers. Several western scholars, including Margoliouth, Schacht and Wansbrough, have suggested that the art of *qiyās* was consciously borrowed from the talmudic method of deduction by analogy known as *heqqēš* (commonly spelled *heqqesh*); and some eminent Muslim scholars agree.[92] But their failure to explain precisely how this occurred has led to vehement (though unsubstantiated) denials by other writers.[93] For this reason, a linguistic proof of the talmudic origin of the term *qiyās* is offered here.

Scholars agree that the word *qiyās* is not native to Arabic (indeed, the root *q-y-s* is not indigenous to *any* semitic language), but only Margoliouth has tried to explain its etymology. Yet it could easily (indeed, *only*) have been coined through a misreading of *maqqīš*, the technical term which introduces hundreds of talmudic analogies,[94] as Margoliouth, who first noted the connection,

91. *Ibid.*

92. Margoliouth, *Instructions*, p. 320. Schacht, *Origins*, p. 99. Wansbrough, *Qur'anic Studies*, p. 167. See also M. Khadduri, *Islamic Jurisprudence: Shāfiʿī's Risāla* (Baltimore 1961, hereinafter *Shāfiʿī's Risāla*), p. 31, note 98, and F. Raḥman, *Islām* (London, 1966) p. 71, who notes that "the term, as consciously formulated, most probably shows foreign influence."

In this study, I use the term *heqqēš* in a general sense, to cover all three of the connotations which it has in the Talmud: (1) its most technical sense, *heqqēš ha-kātūb*, i.e. an analogy drawn *explicitly* in a scriptural text; (2) its most frequent occurrence, (usually as the participle *maqqīš*), meaning that two matters juxtaposed in a scriptural passage are thereby *implicitly* analogized; and (3) its occasional use in a more general sense, to analogize one case to another without reference to close proximity in a scriptural text: thus, in *b. Zebāḥīm 57a*, we find: "You analogized the case (*hiqqaštō*) to [one thing], but I would analogize it (*anī maqqīšō*) to [something else]."

93. The denials seem to come mainly from Pakistani writers. See, for instance, A. Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad, 1970) pp. 135-36; M.R.A. Khan, *Islamic Jurisprudence* (Lahore, 1978), pp. 110-11. The latter states (with only partial accuracy): "Muslim jurists vehemently deny that the principle of *qiyās* was borrowed from foreign civilization." The "vehement denials" are, as I show here, based on arguments that are entirely lacking in substance.

94. Kasowsky, *Concordance*, s.v. *nāqaš; maqqīš, hiqqīš*. A typical instance is found in the first chapter of the Talmud, *Berākōt 4b: maqqīš šekībā ve-qīmā*. "[Scripture] analogizes 'lying down' to 'rising' " (a deduction that *Deuteronomy 6:7*, which ordains that "thou shalt speak of [the Torah] when thou liest down and when thou risest up," implies by this juxtaposition that the rules for reciting the *Shemaʿ* are the same in the morning as at night.

implied.[95] His brief explanation, however, may have been insufficiently clear; for Wansbrough, while accepting the connection, dismisses the linguistic problem with a parenthetical comment: "Whatever the linguistic relation of Arabic *qās* to Hebrew *hiqqīsh* . . . "[96]

The key lies in the fact that the root of *maqqīš* is *not* *q-y-š* (as a person less familiar with Hebrew than with Arabic would suppose), but *n-q-š*.[97] This root, common to Hebrew and Arabic, has in both languages the primary sense of "to strike together" (as with cymbals). Hebrew, ***but not Arabic***, developed an abstract meaning for the fourth conjugation, *hiqqīš*, *maqqīš*, "to analogize" (*i.e.*, "to observe congruence by notionally striking together"). Had Arabic developed this meaning, the form corresponding to *maqqīš* would have been *munqis* (a form not found in the legal literature). This failure to use the root *n-q-s* for the concept "analogize" is clearly due to the fact that the concept, and the term *qiyās*, entered the language from outside before Muslim lawyers had developed it themselves. As Schacht observed, the very fact that *q-y-s* first occurs in this technical, abstract sense with no corresponding primary meaning for the root, is the strongest possible evidence of borrowing from elsewhere.[98] What must have occurred here was a misreading of the talmudic *maqqīš* as *mēqīš* (wrongly assumed to come from a spurious root *q-y-s*, which existed in neither Arabic nor Hebrew). This "misborrowing" produced the verb *qās*, "deduce by analogy" and the verbal noun *qiyās*, "deduction by analogy."[99]

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95. "Instructions," p. 320.

96. *Qur'anic Studies*, p. 167.

97. Through a quirk of Hebrew grammar which has no parallel in Arabic, a first radical *n* assimilates, in certain forms of the verb, to the second radical. The second radical is doubled to compensate for this. (Thus, from *nāqaš*, we get not *manqīš* but *maqqīš* in the fourth conjugation). However, since the doubling is represented *only* by placing a dot in the second radical, and since the dot does not appear in unvocalized texts like that of the Talmud, an Arab reader unfamiliar with this rule could misread the verb in question as a media-weak verb, *mēqīs*. With vowels lacking, this form is indistinguishable from a *prima-n* verb in the fourth conjugation and moreover looks *exactly* like an *Arabic media-weak* verb. This error, incidentally, is common even among Hebrew speakers confronted with an unfamiliar fourth-conjugation verb *prima-n*, and in fact occurs *specifically* with the verb *maqqīš*, which is sometimes wrongly read as *mēqīš* from an assumed root *q-y-š*.

98. Schacht, *Origins*, p. 99. Another anomaly pointing to foreign provenance is the use of *qiyās* (third conjugation noun) rather than *qiyāsa* (first conjugation noun) even though the *verb* is used in the first conjugation.

99. This analysis refutes those who have failed to perceive the connection between *qiyās* and *heqqēš* and exposes the fallacy of those who argue that the words simply come from roots "identical in the two languages." (If this were so, the Arabic term would have been formed from *n-q-s*, not *q-y-s*).

In addition to deduction by analogy (especially arguments *a fortiori*), the Talmud employs other rules of exegesis which are not rules of analogy proper, the two commonest being an *eiusdem generis* rule (deduction from general and specific statements) and a rule of *noscitur a sociis* (deduction from context). These rules, traditionally called the thirteen principles of R. Ishmael, because they appear in the latter's Introduction to the *Sifra* (a second-century midrashic commentary to the book of *Leviticus*), are basically an expanded version of the seven exegetical principles of Hillel, whose system, as Daube has argued, may have been a Judaization of the Hellenistic rhetoric contemporaneously developed in the first century B.C.[100] Shāfiʿī, as we shall see, introduced into Islamic jurisprudence a number of these exegetical rules, subsuming them under the general rubric of *qiyās*.

Some scholars have suggested that the concept of *qiyās* may have been derived directly from the Roman Law *interpretatio* (as Daube proposed for the talmudic rules). But, in the first place, this theory would not account for the evolution of the term *qiyās*. Secondly, granting the merits of the hypothesis for *talmudic* law (which developed contemporaneously with Roman law, borrowed many Roman concepts, and is replete with Graeco-Latin technical terms), the argument has far less merit with respect to *Islamic* law. That system developed centuries after Roman law, at a time and place where the latter had long ceased to hold sway and among people who show no evidence whatsoever of acquaintance with the Latin tongue. (The Greek science preserved by the Arabs in later centuries was translated not from Latin or Greek but from Syriac translations made by early Christians). As Fitzgerald noted, "In the whole vast vocabulary of Islamic law, there is not a single word borrowed from Latin or Greek, unless we except *qānūn*, which means administrative regulation (or sometimes custom) rather than law."[101] Further, he points out that the Roman law school at Beirut,

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100. D. Daube, "Rabbinic Methods of Interpretation and Hellenistic Rhetoric," 22 *Hebrew Union College Annual* (1949), pp. 239-64 (hereinafter "Rhetoric").

101. Fitzgerald, "Alleged Debt," p. 99. Schacht (*Islamic Law*, p. 9), cites *liṣṣ* or *liṣṭ*, "robbery" as a loanword from Greek λῃστης. He notes, however, that this is not the technical Islamic law term for robbery (which is *qaṭʿ al-ṭarīq*, "ambush on the highway"). Moreover, since the same word (in the form *liṣṭīm*) is found frequently in the Talmud, it may well be that the Greek word was in popular use in Iraq. (See, *e.g.*, *b. Berākōt 18a, 29b*, where the word appears in a talmudic rule, later found also in Islamic law, that a traveler may cut short his prayers for fear of highway robbery.

Other attempts to derive Islamic legal terminology from Latin or Greek have been entirely misconceived. Thus, Schacht's derivation of *ʿarabūn*, "surety" from the Greek

where some have surmised that Muslims encountered Roman law, became defunct by 560 A.D. following an earthquake and fire which occurred ten years before the birth of Muhammad.[102] Even if the Muslim rules of exegesis are indirectly traceable to Graeco-Roman rhetoric, it is far more likely that their appearance in Islamic jurisprudence can be traced at first instance to the talmudic use of the rules. Schacht himself, following Snouck Hurgronje, has noted that "[s]ometimes it can be doubtful whether a concept has entered Islamic law directly from Hellenistic rhetoric or by way of Jewish law."[103] Certainly the first attested occurrence of the word *qis*, "analogize" in the *Instructions to the Qāḍī* well justifies Margoliouth's view that "[t]he use of this term makes clear that Omar (if these instructions be genuine) must have had a Jewish lawyer at his elbow."[104]

Before leaving the subject of *qiyās*, we note that in the early development of Islamic law, exegesis based on *qiyās* competed with another form of "discovering" the law, namely the exercise of a scholar's individual judgement based on his own subjective view. This was called *ra'y*, literally "seeing" and hence a scholar's "view" of a particular case. Muslim jurists would ask each other, *ara'ayta?* ("do you think?") or *alā tarā?* ("don't you think?") with respect to the case at hand.[105]

Schacht notes that *ra'y* was more widely used by Iraqi jurists like Abū Ḥanīfa (founder of the Ḥanafī school) than by Medinan jurists — an interesting observation, given the Ḥanafī school's proximity to the talmudic academies of Sura and Pumbedita. A parallel concept is found in the Talmud, expressed in almost identical language: the sages ask each other, *mā rā'ītā?* "How do you see [the matter]?"[106] Frequently, we find one sage rejecting another's proffered analogy

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αρραβων(*Islamic Law*, p. 9) ignores the fact that *ʿarabūn* is an ancient semitic word (found, for instance, in *Genesis 38:17*, *ʿērābōn*, "pledge") and that Santillana has noted that is was from the semitic word that the Greek was derived: *Istituzioni di Diritto Musulmano Malachita* (rome, 1926) vol. 2, p. 57 (hereinafter, *Istituzioni*). Schacht actually goes so far as to represent the Arabic term as *arabūn* (deleting the initial *ʿayn*), apparently to buttress his argument of a Greek derivation! Other similar attempts include the spurious derivation of *wārith*, "heir" from Latin *heres*; *wārith* is in fact the ancient semitic term for "heir" and the precise morphological equivalent of *yorēš*, "heir" in *Genesis 15:3*. (Scholars date *Genesis* to the tenth century B.C., well before the rise of Greece and the influence of Greek or Latin on Hebrew.)

102. Fitzgerald, "Alleged Debt," pp. 88-89.

103. Schacht, *Islamic Law*, p. 21. Snouck Hurgronje, *Selected Works*, p. 75.

104. "Instructions," p. 320. Margoliouth notes several other correspondences with Jewish law in this document.

105. Schacht, *Origins*, pp. 105 ff, citing examples.

106. Kasowsky, *Concordance, s.v. rā'āh: mā rā'ītā le . . .*

by saying: "The *re'i* of this case in not like the *re'i* of that case" (*i.e.*, "the two case are distinguishable"). We find also the noun *re'āyā*, meaning the "evidence" for the conclusion or the "proof" of the analogy.[107]

The similarity of Islamic *ra'y* and talmudic *re'āyā*, both in language and in concept, is clear. It is equally clear that in both systems the use of *ra'y/re'āyā*, being an exercise of individual judgement based on arbitrary perception, impeded the attainment of consensus; several scholars, each applying his own brand of logic to a given problem, were far less likely to reach similar conclusions than if all were constrained by the same rules of exegesis systematically applied, as with *qiyās/heqqēš*. The superiority of the latter method was evident and explains the greater frequency of its talmudic use. Shāfiʿī, likewise, was to insist on the superiority of *qiyās* over *ra'y* in the pursuit of consensus.

In light of the foregoing analysis of linguistic and conceptual correspondences between *qur'ān* and *miqrā*, *sunna* and *mišnāh*, *ijmāʿ* and *ha-kōl* (Gemara) and *qiyās* and *heqqēš*, we now proceed to compare Shāfiʿī's theory of the roots of the law with the juristic bases of talmudic law.

II. SHĀFIʿĪ'S THEORY OF THE ROOTS OF THE LAW

Muḥammad ibn-Idrīs al-Shāfiʿī was born in 767 A.D. in Palestine, in either Gaza or Askelon.[108] Taken as a child to Mecca, he later distinguished himself at the feet of the jurist Mālik in Medina. After Mālik's death, Shāfiʿī traveled widely, both to Syria and to Iraq, where he met the famous jurist Shaybānī of the Ḥanafī school. Shāfiʿī spent his final years in Egypt, where he completed the *Risāla*,[109] a work begun in Iraq and destined to have profound effect on the development of Islamic legal theory.

By Shāfiʿī's time, the concepts of *qur'ān*, *sunna*, *ijmāʿ* and *qiyās* were already well known. The notion of *uṣūl al-fiqh*, "roots of legal science" is found in the works of earlier Iraqi jurists like Abū Yūsuf (d.

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107. This Hebrew/Arabic use of the verb "to see" may be compared with "evidence," from Latin *vidēre*, "to see" and with "speculate" (in the sense of "form a theory") from Latin *speculari*, "to view or observe."

108. Authorities are divided as to Shāfiʿī's birthplace. This and other biographical details are taken from Khadduri, *Shāfiʿī's Risāla* (note 92 above), pp. 8 ff.

109. The full title is: *Kitāb al-Risāla fī Uṣūl al-Fiqh*, "Treatise on the Roots of Jurisprudence." The *Risāla* appeared in its final form in Egypt between 815-20, though Shāfiʿī is said to have written an earlier version some years before. Page numbers are given here for the two principal editions, the Būlāq (Cairo, 1904, hereinafter *ed. B.*) and the Shākir (Cairo, 1940, hereinafter *ed. S.*).

798) and Shaybānī (d. 805).[110] However, it was Shāfiʿī who wote the earliest known treatise on the *uṣūl* and their interrelationships.[111]

There can be no doubt that Shāfiʿī's firsthand experience of the three main traditions of Islamic scholarship (in Medina, Syria and Iraq) imbued him with a more global vision than any of his predecessors. Muslim and Western scholars agree than his work laid the foundations of the classical jurisprudence which evolved in the century following his death in 820 A.D. Certainly he gave a new significance to the terms *sunna, ijmāʿ* and *qiyās*. Yet, in analyzing Shāfiʿī's innovations, we find a striking resemblance between Shāfiʿī's treatment of the four roots of the law and the treatment of their talmudic counterparts by the Jewish sages. We shall explore this resemblance in detail.

1. *Shāfiʿī's Innovations*

Perceiving at first hand the divisive effects of independent development of so many Islamic schools, each with its own *ijmāʿ* and its self-proclaimed "*sunna* of the Prophet," Shāfiʿī saw the need to synthesize a self-consistent tradition of prophetic *sunna* (as reported in the *ḥadīth*) which could become the unified Sunna of Islam. To this end, he visited many towns, recording local *ḥadīth* and ranking them according to the authenticity of the supporting *isnād* or chain of tradition.[112] Shāfiʿī thought it of paramount importance to trace traditions right back to the Prophet (or his Companions or Successors); he ranked such traditions, even those with tenuous links, higher than conflicting reports with stronger links but occasional gaps in the chain.[113]

Shāfiʿī's pursuit of a unified Sunna drew him into dialogues with the principal jurists of both Kufa and Medina, on such topics as the nature of *ijmāʿ* and the relative merits of *qiyās* and *ra'y* as tools of jurisprudence. These dialogues, preserved in the *Risāla* and in Shāfiʿī's other writings,[114] reflect his view of the shortcomings of the jurisprudence of his day.

In the *Risāla*, Shāfiʿī postulates the existence of four sources of law: "Legal authority may consist of (1) a communication in the

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110. Khadduri, *Shāfiʿī's Risāla*, p. 40. I. Goldziher, *Ẓāhiriten* (1884), tr. as *The Ẓāhirīs* (Leiden, 1971), *passim*.

111. *Ibid.*, p. 41.

112. *isnād*, from *sanada*, "to support."

113. Schacht, *Origins*, pp. 51-52; *Risāla, ed. B.*, p. 82, *ed. S.* pp. 597-98; *ed. B.* p. 60, *ed. S.* p. 467.

114. Notably in volume 7 of *Kitāb al-Umm, "The Book of Origins."* Schacht quotes directly from many of these dialogues in his chapters on *ijmāʿ*, *qiyās* and *ra'y* (*Origins*, pp. 82-132).

Book; or (2) the Sunna; or (3) [something which is known by] *ijmāᶜ*; or (4) [something derived from] *qiyās*"[115] Except for the first of these (the Book, *i.e.*, Qur'an, which all Muslims accepted as the *fons et origo* of divine law), Shāfiᶜī invested each of these concepts with a new significance, relating them to each other in ways that were radically new in Islam. Investigation discloses, however, that Shāfiᶜī's notions had direct parallels in talmudic law.

Shāfiᶜī's redefining of the basic concepts of Islamic law had a specific rationale. Reasoning that a God who had chosen one People to receive one Scripture through one Prophet must have intended to subject that People to a single, unified Law, he set out to fashion a jurisprudence that would serve that end.[116] It was clearly necessary to redefine the concept of *sunna* so as to eliminate (at least in theory) the possibility of conflict. But Shāfiᶜī's genius lay less in defining the goal than in the means he adopted in its pursuit. This was, quite simply, *to postulate the divinity of the Sunna along with that of the Qur'an.* If the oral law, like the written law, came directly from God through the Prophet, it could surely contain no inconsistencies. Acceptance of that premise would provide a strong impetus towards the reconciliation of conflicting traditions.

To this substantive change in the definition of Sunna, Shāfiᶜī added two further changes designed to implement the first: he redefined *ijmāᶜ* to mean not the consensus of the scholars of each separate school but the consensus of the Muslim community as a whole; and he expanded the rules of *qiyās* to include much more than simple arguments by analogy. We shall examine each of these innovations in turn.

2. *Qur'an and Sunna in Shāfᶜī's Scheme*

Pre-Shāfiᶜīan jurists had not invested the Sunna with actual divinity. Except for the word of God as transmitted in the Qur'an, they perceived the words and acts of the Prophet, though divinely inspired, as a strictly *human* phenomenon: the ideal conduct of one chosen by God, but not God's law in the same sense as the Qur'an. This view was dictated by the Qur'an's stern condemnation of those who, while professing monotheism, "ascribe partners to Allah"[117] and

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115. *Risāla, ed. B.* p. 8, *ed. S.* p. 39.

116. Coulson, *History*, p. 55: "His supreme purpose was the unification of the law."

117. *Sūras 5:72* and *9:30-31*. These *sūras* are a polemic against self-styled monotheists who inject polytheistic elements into their faith. In particular, the Qur'an castigates the Christian Trinity. In a much later *sūra*, following the refusal of the Jews of Medina to accept Muhammad as a prophet, the Qur'an tries to make a similar case against the Jews. Unable to find a single polytheistic element in Judaism, the Prophet claimed

by the consequent desire to avoid even the semblance of deifying the Prophet by ascribing divinity to his extra-qur'anic utterances.[118]

Shāfiʿī's postulation of the divinity of the Sunna was thus revolutionary. To gain acceptance, it would need strong support from undisputed authority. That support Shāfiʿī found in the language of the Qur'an, which, he claimed, proved that both *qur'ān* (written revelation) and *sunna* (oral tradition) stemmed equally from God. He emphasized this equivalence by calling the Qur'an and the Sunna "the twin roots,"[119] a locution which subtly conveyed a sense of "equal authority" similar to that conveyed by the talmudic coupling of *miqrā* and mīšnāh discussed above.

Shāfiʿī's prooftext for the equal divinity of Qur'an and Sunna was the frequent occurrence of the qur'anic phrase *al-kitāb wa'l-ḥikma*, "the Book and the Wisdom."[120] The meaning of this expression was obscure to Muslim exegetes; *al-kitāb* clearly meant the Qur'an, but *al-ḥikma*, "[the] Wisdom" had no obvious referent. Shāfiʿī claimed, first that *al-ḥikma* must mean, not God's wisdom in general, but a very specific Wisdom, namely the body of oral tradition handed down from the Prophet, whom God had ordered Muslims to obey. By reading together two qur'anic verses which linked "obedience to God's messenger" with "the Book and the Wisdom,"[121] Shāfiʿī concluded that: "God mentioned the Book, which is the Qur'an; and he mentioned the Wisdom; . . . those who are learned in the Qur'an . . . hold that Wisdom means the *sunna* of the messenger of God."[122]

The interpretation of *ḥikma*, "wisdom," as the *sunna* of the Prophet was the minor premise in the syllogistic proof of the divinity of the Sunna. The major premise was the Qur'an's assertion that the

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(with no foundation whatsoever, as qur'anic scholarship concedes today), that the Jews called a certain ʿUzayr (perhaps an Arabicization of ʿEzra) the son of God! The motive for these polemics was apparently a desire to show that Islam alone was a truly monotheistic faith.

118. A special *genre* of extra-qur'anic prophetic utterance, the *ḥadīth qudsī* or "sacred saying," is discussed by W. Graham in *Divine Word* (note 63 above). As Graham points out, the dichotomy between "divine word" and "prophetic word" breaks down here, since the *ḥadīth qudsī* commences with the words "God said . . . " The present study, however, is concerned only with the more typical "legal" *ḥadīth*, which purports to describe words or conduct of the *Prophet*, not of God Himself.

119. *Kitāb al-Umm*, vol. 6, p. 203: " . . . the Book and the Sunna — these are the twin roots which God, powerful and exalted, has prescribed." (The use of the Arabic dual plural, *al-aṣlān*, subtly equates the authority of these two roots as sources of Islamic law).

120. *Sūras 2:129, 151, 231; 3:164; 4:113; 62:2.*

121. *Sūras 8:20* and *3:164.*

122. *Risāla, ed. B.* pp. 13-14, *ed. S.* p. 78: *yaqūl al-ḥikma sunnat rasūl Allah.*

Wisdom, along with the Book, stemmed directly from God Himself. This, as Shāfiʿī pointed out, was the plain meaning of the qur'anic statement that "Allah has *sent down* to you the *kitāb* and the *ḥikma*."[123] If God had sent down the *ḥikma*, and if *ḥikma* meant *sunna*, said Shāfiʿī, it followed necessarily that God had sent down the Sunna. Hence, the Sunna was not merely the ideal conduct of a man divinely inspired; it was, like the Qur'an itself, the *direct word of God* transmitted through the life of the Prophet.

The doctrine of the divinity of the oral tradition seems, in Islam, to have originated with Shāfiʿī. But in Judaism, the divinity of the oral law had been a cardinal tenet for centuries. Talmudic doctrine claimed explicitly that Moses received on Sinai not merely the Decalogue but the whole of the written scripture (*Torah, Prophets* and *Hagiographa*) *and also the whole of the oral law* (*Mishnah* and *Gemara*).[124] The Jewish oral law was held to be of direct and immediate divine origin, just as the Torah itself. Thus Shāfiʿī, in postulating the divinity of the Sunna, raised it, as a source of law, to the status occupied by the Mishnah in the talmudic scheme.

This coincidence of concept may be no accident. Shāfiʿī had based his conclusions on an interpretation of *kitāb* and *ḥikma*. But this is precisely the terminology used to denote the *Jewish* written and oral law respectively from earliest talmudic times. We noted earlier the correspondence between *kātūb* and *kitāb* as names for the written law of Judaism and Islam. We now note a similar parallel between the use of the term *ḥikma* to designate the Islamic oral tradition and the use of cognate Hebrew terminology, based on *ḥokma* "wisdom" to describe the Jewish oral law. The sages of the Talmud are called *ḥakāmīm*, "wise men."[125] Their rulings are called *dibrei ḥakāmīm*, "the words of the wise."[126] The talmudic sages were thus seen as repositories of *ḥokma*, the oral tradition.[127] In

123. *Sūra 4:113*, The qur'anic use of the verb *anzala*, literally, "to drip like rain" in speaking of "sending down" God's Word, may be compared to the biblical *nazal*, "to drip down" as used in *Deuteronomy 37:2*: "My speech shall distil (*tizzal*) as the dew."

124. *b. Berākōt 5a*: "[*Exodus 24:9*, as interpreted] teaches us that all these things [*Decalogue, Torah, Prophets, Hagiographa, Mishnah and Gemara*] were given to Moses at Sinai."

125. Hebrew *ḥākām* is identical with Arabic *ḥakam*, the term for a pre-Islamic arbiter of disputes. The Arab *ḥakam's* function as judge coalesced with his function as lawmaker, since his judgment was considered an authoritative statement of the customary law (*sunna*). Schacht, *Islamic Law*, p. 3. The talmudic sage (*ḥākām*) was likewise both judge and expounder of the law.

126. Kasowsky, *Concordance*, s.v. *dābār: dibrei ḥakāmīm*.

127. In this connection, it may be significant that the word *ḥokmā*, used in the sense of "wisdom," occurs only twice in the Torah, and both occurrences seem to be implicitly connected with the idea of oral tradition. In *Deuteronomy 34:9*,

interpreting "the *kitāb* and the *ḥikma*" to mean Qur'an and the Sunna, Shāfiʿī was defining language linguistically and conceptually equivalent to the talmudic terminology for written and oral law.

Coulson rightly regards Shāfiʿī's redefinition of the Sunna as his single most important contribution to Islamic jurisprudence;[128] it is the cornerstone of his scheme, just as the Gemara's postulation of the divinity of the oral law is the cornerstone of the talmudic scheme. Theocratic systems depend on persuading their adherents that *all* law (including rules not found in the scriptural revelation but only in the tradition of the sages) comes from God.[129] Such a postulation, from Shāfiʿī's point of view, bestowed an additional benefit; the replacement of earlier notions of *sunna* (as the separate tradition of each school, or even as the "practice of the Prophet") by the concept of a unified Sunna of Islam stemming from a single, divine source, necessarily implied that the Sunna could contain no inconsistencies. Thus, in postulating the divinity of the Sunna, Shāfiʿī "aspired to eradicate a root cause of diversity . . . and instil uniformity into the doctrine."[130] Tragically struck down in his prime by the supporters of a rival, Shāfiʿī did not live to attain his goal; but it was later maintained that had he lived longer, no differences of opinion would have survived.[131]

Shāfiʿī's work helped to reduce considerably the proliferation of divergent traditions; yet the survival of four orthodox (Sunni) schools to this day testifies that Islam, like Judaism, failed to eliminate all theoretical conflict (though the Talmud, as we saw, solved the practical problem by arbitrarily selecting one school over another to define the *halākā*). Both faiths, unable to produce theologically sound explanations for irreducible conflicts, resorted to aphorisms. The Talmud says of conflicting traditions: "Both these and those are

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"Joshua . . . was filled with the spirit of *ḥokmā*, for Moses had laid (*ṣāmak*) his hands on him." Joshua, in Jewish tradition, is the first link in the transmission of the oral law down the generations; and the guardians of the oral law (*i.e.*, the rabbis) were for centuries ordained in an unbroken line by the laying on of hands. (Ordination today is still called *semīkā*, from the verb used in *Deuteronomy*). The other occurrence of *ḥokmā* is in *Deuteronomy 4:6*, which exhorts the Children of Israel to "*keep* and *do* [the Law] . . . for it is your *wisdom* (*ḥokmā*) and your *understanding* (*bīnā*) in the eyes of the gentiles." Rashi comments: " 'keep' refers to the Mishnah." In the parallelism of biblical verse, the referent of "keep" appears as *ḥokmā*. Thus Rashi here implicitly equates *ḥokmā* with Mishnah.

128. Coulson, *History*, p. 56.

129. This was in fact the Gemara's reason for making the statement cited in note 124 above. As Crone and Cook have pointed out, "it was a last resort of the rabbis when the resources of scripture had failed them." *Hagarism*, p. 182, n. 31.

130. Coulson, *History*, p. 57.

131. Khadduri, *Shāfiʿī's Risāla*, p. 45. Of Shāfiʿī's untimely death, Khadduri says: "The incident gives us a picture of the consequences which heated controversies between rival schools of thought could generate." *Ibid.*, p. 16.

the words of the living God;"[132] while Muslim tradition ascribes to the Prophet that "*ikhtilāf* ("difference of opinion") in my community is a sign of the mercy of Allah."[133]

3. *Iǰmāᶜ in Shāfiᶜī's Scheme*

The role of *iǰmāᶜ* in early Islamic jurisprudence resembled that of consensus in the Gemara, but with one important difference: the Islamic *iǰmāᶜ* was local, and the schools were often in conflict, while the talmudic consensus was global, resulting from conscious attempts to reconcile conflict in order to produce a rule of *halākā*.[134] Thus, while the talmudic consensus tended to unify the law, the early Islamic *iǰmāᶜ* had for the most part a divisive effect.

Shāfiᶜī, having surveyed the entire field, and owing no strong allegiance to any school,[135] recognized the theoretical and practical need for a global *iǰmāᶜ* if a unified Sunna were to be achieved. The pernicious results of conflicting local *iǰmāᶜ*, as well as the theoretical inelegance of conflicting traditions, each claiming to be "*sunna* of the Prophet," inspired Shāfiᶜī an polemics against the jurists of Kufa and Medina alike. Shāfiᶜī' dialogues with the leading jurists, as Schacht notes, "forced [the schools] to confront a problem of which they had not been consciously aware,"[136] namely, that conflicting traditions from the Prophet were a logical impossibility. This problem was compounded by Shāfiᶜī's postulation of the divinity of the Sunna; if the Prophet's words and deeds reflected God's explicit instructions, inconsistencies were intolerable. Shāfiᶜī inveighed against uncritical adherence to local consensus (which had led Medinan jurists to claim their local *iǰmāᶜ* as the basis of the only true *sunna* and Iraqi jurists to

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132. *b. ᶜErūbīn 13b.*

133. Abū Ḥanīfa, *al-Fiqh al-Akbar*, cited in Schacht, *Origins*, p. 96.

134. Throughout this study (as indicated in note 24 above), "Talmud" means the *Babylonian Talmud*, which was produced by sages who remained in Judaea after the Dispersion. Because their numbers were small, and because the cultural and intellectual center of Jewry had shifted to Babylonia, the Jerusalem Talmud ultimately came to enjoy less authority, and in cases of divergence, the halakic rule followed the Babylonian Talmud. During the period duscussed here, there was for practical purposes only one Talmud and thus only one source of talmudic consensus.

135. Shāfiᶜī initially associated himself to some extent with the Mālikī school, calling Mālik "our master." Schacht, *Origins*, p. 9. But he did not hesitate to criticize the Mālikīs as sharply as he criticized other schools. Althougn Shāfiᶜī avoided founding a school of his own (his object being uniformity rather than diversity in the law), his followers founded the Shāfiᶜī school after his death.

136. *Origins*, p. 11.

claim universal character for their own *ijmāᶜ*)[137] and insisted on the need for a global consensus of Islam.

Shāfiᶜī's theory of *ijmāᶜ* is set down in the *Risāla*. He discusses both notions of consensus, the *ijmāᶜ* of the people and the *ijmāᶜ* of the scholars. He assigns a higher value to the former, stating that the *ijmāᶜ* of the people (being by definition unanimous) is the only kind truly deserving of the name. The unquestionable validity of the communal *ijmāᶜ* rests, says Shāfiᶜī, on the principle (apparently introduced by him) that a rule or custom on which all Muslims agree, even though it is mentioned neither in the Qur'an nor in the Sunna, cannot possibly be an error: "We know that the generality (*ᶜāmma*) of the people can never agree on something which deviates from the Sunna of the Prophet, nor on an error, God forbid!"[138] Thus, in Shāfiᶜī's scheme, the *ijmāᶜ* of the people becomes nothing less than a third substantive root of law along with *qur'ān* and *sunna*, rather than a tool of methodology like the *ijmāᶜ* of the scholars.

This Shāfiᶜīan innovation is extremely interesting for two reasons. First, Shāfiᶜī's rationale for accepting the validity of the communal consensus recalls the talmudic maxim that in the absence of an explicit rule in the Torah or Mishnah, one must "go out and see what the people (*ᶜamma*) do,"[139] the rationale being, "Leave it to Israel; if they are not themselves prophets, they are still the children of prophets [and thus will not, as a body, fall into error]."[140] Secondly, we note that Shāfiᶜī's reason for relying on the people uses neither the normal term *ijmāᶜ al-umma*, "consensus of the people" nor his own favored expression, *ijmāᶜ al-muslimīn*, "consensus of the Muslims;" instead, he employs here the term *ᶜāmma*, "the generality," which is from the same root as the Aramaic language of the talmudic rule.

The second form of *ijmāᶜ*, as noted earlier, was *ijmāᶜ al-ᶜulamā'*, consensus of the scholars. Shāfiᶜī accords this "so-called" *ijmāᶜ* a far lower status, because, as he ceaselessly complains to his interlocutors, *ijmāᶜ* is a misnomer when applied to scholars, whose consensus is

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137. *Ibid.*, pp. 83-87.

138. *Risāla, ed. B.* p. 65, *ed. S.* p. 472. Schacht points out that Shāfiᶜī's formulation of this principle must antedate the tradition, later ascribed to the Prophet, that "my community will never agree on an error." Had Shāfiᶜī known that tradition, he would certainly have cited it. This is a typical example of Schacht's evidence that hundreds of spurious traditions arose to justify legal principles which in reality were introduced long after the time of the Prophet. *Origins*, p. 91.

139. *b. Berākōt 45a: pōq hazei may ᶜammā dābār.* See text to note 78 above.

140. *b. Pesāḥīm 66a.* See text to note 79 above. Both the Jewish and Muslim versions of this principle may be compared with the Christian theologian Alcuin's later formulation: *vox populi, vox Dei.*

rarely unanimous even within a given school, and frequently differs from one school to the next.[141]

Shāfiʿī's caustic attitude towards the *ijmāʿ* of the scholars as contrasted with the *ijmāʿ* of the people, has caused confusion among modern writers, some claiming that Shāfiʿī rejected *ijmāʿ* as a source of Islamic law.[142] But this is not so. As to the *ijmāʿ* of the people, he not only recognized this but elevated it to a higher status than before. Indeed, he placed it above *qiyās* (which had previously been treated as the third root of law): "With regard to that which is implicit in the Qur'an,[the scholar] should seek enlightenment from the Sunna of God's messenger; and if he finds no Sunna, then from the *ijmāʿ* of the Muslims; and if there is no *ijmāʿ*, then by using *qiyās*."[143]

As for the *ijmāʿ* of the scholars, Shāfiʿī accorded some validity to this also, subject to two departures from earlier doctrine. The first was an insistence that each *sunna* asserted by the *ijmāʿ* should be traced back in an unbroken line to the Prophet. The second was that since, in practice, unanimous scholarly consensus was virtually unattainable, the jurists must be prepared to accept the validity of a majority opinion, "though we do not claim this as a unanimous consensus."[144] Shāfiʿī's explicit recognition that unanimity, unattainable in practice, should not be required in theory, conceded to a reality not previously acknowledged.

Like his insistence on an unbroken chain of transmission, Shāfiʿī's acceptance of a less-than-unanimous consensus as a legitimate basis for a legal ruling has talmudic undertones. It recalls the Gemara's practice of recording dissents while concluding with a statement that "the sages rule as follows . . . " (it being understood that the *halākā* follows the majority, as specified in the Talmud itself).[145]

Shāfiʿī's treatment of *ijmāʿ* altered the status of *ijmāʿ* in the hierarchy of roots of the law. The early jurists had placed *qiyās* (or its alternative, *raʾy*) next in importance after *qurʾān* and *sunna*. They saw *qiyās* as a methodological tool to aid in finding answers to unsettled points; but the goal of their deliberations was a purely local *ijmāʿ*, which was seen as the *fourth* rather than the *third* source of law. Shāfiʿī, however, seeing *ijmāʿ* primarily as unanimous popular

141. Schacht, *Origins*, pp. 92-94.

142. Those who take *ijmāʿ* to mean primarily the consensus of the *scholars* have tended to claim that Shāfiʿī rejected *ijmāʿ* as a substantive root of law, and to group *ijmāʿ* with *qiyās* as tools of methodology. Those who take *ijmāʿ* to mean primarily the unanimous *popular* consensus tend to treat it, as did Shāfiʿī, as the third substantive root of law.

143. *Risāla, ed. B.* p. 70, *ed. S.* p. 510.

144. *Kitāb al-Umm*, vol. 7, p. 244. Schacht, *Origins*, p. 92.

145. *b. Berākōt 9a.* See note 87 above.

consensus, ranked it third in the hierarchy, placing it above *qiyās*, which he saw as a tool to be used only when there was no *qur'ān*, *sunna* or *ijmāᶜ* on the point: "It is not permissible to disagree with an unambiguous *qur'ān*, nor with an established *sunna*, nor, I think, with the community at large (*jamāᶜat al-nās*), even where there is no *qur'ān* or *sunna*."[146] Shāfiᶜī states that *qiyās* is "weaker" than *ijmāᶜ* and expresses the lower status of *ijmāᶜ* by calling it not a *root* of law but merely a *branch* of the law.[147] (However, in the classical theory, *qiyās* came to be called a root, just as the other three sources).

Shāfiᶜī's restructuring of the hierarchy of sources of law brought the theory of Islamic law even closer than before to the talmudic system. In place of two substantive roots of law (*qur'ān* and *sunna*, which Shāfiᶜī himself called "the twin roots") and two methodological tools (*qiyās* and *ijmāᶜ*), Shāfiᶜī's reformulation produced three substantive roots (*qur'ān*, *sunna*, and popular *ijmāᶜ*) plus one tool of methodology (*qiyās*). This scheme seems to parallel the structure of talmudic jurisprudence, in which the "twin roots" of *miqrā* and *mišnāh* were augmented by later rulings presented as the *ha-kōl* consensus of the Gemara. The latter, upon its final redaction in the sixth century, became a third substantive source of law, precisely because it expressed (at least formally) a global rather than a local consensus, instead of being one among many competing traditions like the separate *ijmāᶜ* of the Islamic schools. This was exactly what Shāfiᶜī hoped to achieve by his insistence on a single, unified *ijmāᶜ* of Islam.

4. *Qiyās in Shāfiᶜī's Scheme*

There are three salient features in Shāfiᶜī's treatment of *qiyās*. These are: his ranking of *qiyās* below the other three sources of law; his promotion of *qiyās* over *ra'y* as the better form of legal reasoning; and his introduction of several "new" types of argument under the rubric of *qiyās*.

The first of these features, the demotion of *qiyās*, was a necessary corollary of his promotion of the popular *ijmāᶜ*. *Ijmāᶜ* having become a third substantive source of law along with *qur'ān* and *sunna*, this left *qiyās* as a residual category, a mere "branch" of legal science, to be used only where none of the other sources had already decided the point. Thus, Shāfiᶜī criticized the Iraqis for relying on *qiyās* without first looking for a *sunna*; but he inveighed equally against the Medinans for using *qiyās* to alter a known *sunna*

146. *Kitāb al-Umm*, vol. 7, p. 275.
147. *Risāla, ed. B.* p. 82, *ed. S.*, p. 599. *Kitāb al-Umm*, p. 274.

that seemed to contradict juristic logic.[148] For Shāfiʿī, a unanimously-accepted *sunna* was a higher source of law which must stand even where contrary to *qiyās*.

Shāfiʿī's attitude follows logically from the single most important innovation he brought to Islamic jurisprudence, namely his postulation of the divinity of the Sunna. *Sunna*, as divine revelation, necessarily took precedence over *qiyās*, which was merely a manifestation of human reason. Here we see another analogy with talmudic thinking. There are many rules in the Torah which lack a stated or obvious purpose These include the biblical laws of *kashrūt*, which arbitrarily define which animals are fit (*kāshēr*) to eat.[149] Attempts to explain these rules on some rational basis like health regulation, or as irrational taboos based on a horror of creatures that prey on others or are thought to blur the lines of generic classification,[150] are rejected by traditional Judaism, which takes the view that such rules must be observed simply because God has commanded them, no matter whether they comport or conflict with human reason.[151] Shāfiʿī's insistence that *qiyās* many not be used to nullify an accepted tradition appears to reflect a basically similar view.[152]

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148. Schacht, *Origins*, pp. 109, 116, 122-23.

149. *Leviticus 11*. The Qur'an specifically states that Muslims may eat that which is lawful for the People of the Book (*sūra 5:5*) and specifically prohibits (as does the Torah) carrion, pork and the blood of slaughtered animals (which must be drained, in Islamic as in Jewish law, by the sḥehita method of ritual slaughter). *Sura 16:115*.

150. See Mary Douglas, *Purity and Danger* (London and New York, 1966); Jean Soler, "The Dietary Prohibitions of the Hebrews," *New York Review of Books* (June 14, 1979); Robert Alter, "A New Theory of Kashrut," *Commentary* (August, 1979).

151. Such rules are called *ḥōqq* (*pl.*, *ḥuqqīm*), "statutes." The word is identical with Arabic *ḥaqq*, meaning "truth" or "right" especially as used in the expression *ḥaqq-Allah*, "the right of Allah" (*i.e.*, God's right to man's performance of certain religious duties, like prayer, fasting or dietary laws), as opposed to *ḥaqq-adām*, "human rights," *i.e.*, man's right (decreed, however, by God) to be treated in a certain way by his fellow-man. This distinction seems to be patterned on the talmudic distinction between law *bein ādām la-Māqōm* ("between man and God" and laws *bein ādām la-ḥabērō* ("between man and his fellow"). This terminological distinction is as close as Judaism and Islam come to distinguishing between what westerners think of as "religion" and "law," but both types of law are regarded as God's decree.

152. Schacht, *Origins*, p. 122. It is true that Shāfiʿī has in mind primarily cases where *qiyās* would dictate a different rule, while the talmudic sages had in mind rules which were simply inexplicable by human reason. Both systems, however, equally preclude the application of reason to an established rule, making it impossible to change the rule, even when subsequent advances in human knowledge show that a rule was based on misinterpretation of texts. A case in point is the Torah's thrice-repeated injunction against "seething a kid in its mother's milk" (*Exodus 23:18, 34:26; Deuteronomy 14:21*.

The second distinctive feature of Shāfiʿī's approach to the use of human reason to augment divine revelation, is his preference for *qiyās* over *ra'y*. In his earlier work, he himself had used *ra'y* in the arbitrary fashion of the early jurists;[153] later, however, he rejected *ra'y* for its arbitrary nature, in favor of *qiyās* which, based on prescribed rules of exegesis, was more likely to achieve a scholarly consensus on a point at issue. Shāfiʿī, as we know, saw unanimous consensus as the only true *ijmāʿ*; he therefore explicitly defined *ijtihād*, the scholarly effort to interpret and deduce the law, as synonymous with *qiyās*, not with *ra'y*.[154]

To improve the consistency of results obtainable by *qiyās* and reduce the tendency to resort to *ra'y*, Shāfiʿī introduced into Islamic law a number of exegetical rules, which he placed under the rubric of *qiyās* even though some were not rules of analogy proper.[155] Thus, from Shāfiʿī's time on, *qiyās* came to connote "deductive logic" in a broader sense.

It is in this part of Shāfiʿī's work that we see the most striking parallels with the talmudic method. The Talmud, we noted, uses rules of rhetoric traceable to the first century B.C. These include rules of analogy and other rules of logical inference. Shāfiʿī presents some of these same rules in the *Risāla*.

Among the rules of analogy proper is the argument *a fortiori*. This may run either *a minori ad maius* or *a maiori ad minus*, depending on context. Shāfiʿī formulates the rule as follows:

> The strongest kind of *qiyās* is the deduction, from the prohibition of a small quantity, of the equal or stronger prohibition of a larger quantity . . . and from the permitting of a large quantity, of the presumably even more unqualified permissibility of a smaller quantity.[156]

This argument is virtually identical with the talmudic rule of *qal wa-ḥōmer*, an exegetical rule of deduction from less to greater or from greater to less, whereby in applying restrictions an inference

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This was interpreted to forbid the mixing of meat and dairy foods. It is now surmised that the prohibition was a cultic one, referring to pagan sacrifice (as should have been obvious from its placement among cultic prohibitions rather than among the dietary laws). Nonetheless, orthodox Jews continue to observe the prohibition as interpreted.

153. Schacht, *Origins*, p. 120.

154. *Risāla, ed. B.* p. 66, *ed. S.* p. 477: "*ijtihād* is *qiyās*." *ijtihād* (like *jihād*) comes from a root meaning "to strive or struggle;" *jihād*, "holy war" is a physical struggle on behalf of Allah, while *ijtihād*, "self-striving" is an intellectual effort to understand and interpret God's law.

155. Khadduri, *Shāfiʿī's Risāla*, p. 29. Schacht points out that for Shāfiʿī, "*qiyās* often means not a strict analogy, but consistent reasoning in a broader sense." *Origins*, p. 126, citing several examples.

156. *Risāla, ed. B.* p. 70, *ed. S.* p. 513.

may be drawn from the less to the greater, while in granting permissions an inference may be drawn from the greater to the less.[157]

Besides the *a fortiori* analysis, Shāfiʿī introduced under the rubric of *qiyās* other types of talmudic-style deductive logic, prominent among them an *eiusdem generis* argument based on the relationship of general and specific expressions in scriptural texts. In the *Risāla*, he cites qur'anic laws which, though framed in general terms, must be limited by exegesis to specific applications, as well as laws which,though framed in both general and specific terms, are interpreted as of general application, the specific case merely illustrating the general rule.[158] Curiously,we find here (in contrast to Shāfiʿī's usually sophisticated level of exposition) that his examples are either simplistic or unclear and suggest a somewhat rudimentary grasp of the argument from general and specific cases.[159] One is left with the impression that Shāfiʿī had recently discovered the existence of this argument and was not yet clear about how to use it.

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157. There are hundreds of talmudic instances of *qal wa-ḥomer* (literally, "[argument] from light and heavy"). A typical instance is the following: as between the Sabbath (when all work is forbidden) and festivals (when only some kinds of work are forbidden), the Talmud says:

> Since on the Sabbath [when one may not slaughter for food] theTorah permits slaughter for sacrifice, we may deduce that on festivals [when one may slaughter for food], it must be permissible to slaughter for sacrifice. *b. Bēẓā 20b.*

158. *Risāla, ed. B.* pp. 10 ff, *ed. S.* pp. 53 ff.

159. A simplistic argument: On *sūra 22:73*, "O ye people, a parable is coined, so listen to it: verily, those to whom ye pray besides Allah cannot create a fly," Shāfiʿī explains that, although "people" usually means "people in general," in this case the meaning is specific, since the only "people" being addressed are those who worship idols. A complicated and unclear argument is Shāfiʿī's analysis of *sūra 5:6*: "When you stand up for prayer, wash your faces and your hands up to the elbow, and wipe your heads and feet up to the ankles." Shāfiʿī tries to show how this verse can be interpreted to mean that the feet must actually be washed like the hands before prayer (and not merely *wiped* as the verse seems to say). "[God], glorious be His praise, meant that the feet are intended to be washed [in the same manner] as the face and hands. The literal meaning of this communication is that [the duty of washing] the feet cannot be fulfilled save by what fulfils [the duty of washing] the face *or* wiping the head. However, what was meant by the washing or the wiping of the feet was not all — but [only] some — of those who perform the duty of ablution." *Risāla, ed. B.* p. 12, *ed. S.* p. 66. At this point, Shāfiʿī seems to lose the thread of his argument, for he goes on to deduce, not from the text itself but from some *sunna* on the point, that this law (however interpreted) is not of general application.

The talmudic rules of exegesis are far more clearly formulated and applied. Thus, the rules of argument from general and specific cases are set out, in part, as follows:

> *When a generalization is followed by a specification, only what is specified applies.*
> *When a specification is followed by a generalization, all that is implied in the generalization applies.*

Another of Shāfiʿī's exegetical rules was the rule *noscitur a sociis*, whereby the meaning of a term can be deduced from its context.[160] This echoes the talmudic rule of deduction from context.[161] In fact, all of Shāfiʿī's exegetical innovations are to be found among R. Ishmael's (and Hillel's) principles mentioned above, which date from eight centuries before.[162]

In discussing the likely influence of hellenistic rhetoric on the talmudic system, we noted the implausibility of the suggestion that Islamic law incorporated the same rules directly from their hellenistic source. Reference was made to the time lag involved, and to the total lack of evidence that the early Muslim jurists knew either Latin or Greek. It is further contraindicated by Shāfiʿī's including the rules of general and specific cases and deduction from context under the rubric of *qiyās* even though these were not rules of analogy but rather of elucidation of text (and thus not included in the talmudic category of *heqqēš*).[163] Shāfiʿī's failure formally to distinguish the category of analogy from other categories argues against the

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The first argument is applied, for instance, to *Leviticus 18:6*: which states that "None may marry any near relative." Since this is followed at once by a list of forbidden marriages, we deduce that the term "near relative" is limited to those specified in the list (which does not, for instance, include first cousins). The second argument is applied, for instance, to *Exodus 22:9*, which states the liability incurred "if a man gives his neighbor an ass, or an ox, or a sheep, to take care of, *or any animal*, and it dies." Here, the generalization follows the specific list, so we deduce that liability extends to all animals, not merely those specifically named.

160. *Risāla ed. B.*, p. 11, *ed. S.* p. 62. Here, too, Shāfiʿī gives a simplistic example: the phrase "the town . . . which transgressed the Sabbath" in *sūra 7:163* must be interpreted as meaning only the *people* of the town, not the houses, since these cannot transgress!

161. An example of this rule is the appearance of the word *tinšemet* among a list of birds in *Leviticus 11:30*. We deduce from the context that *tinšemet* must be the name both of a certain bird and of a certain reptile. (The possibility of scribal error explaining the inclusion of this name in both lists is not considered, since the text is treated as the direct word of God to Moses, accurately transmitted down the ages).

162. These rules, found in the introduction to the *Sifra* (a midrashic commentary on *Leviticus*) are recited in the daily morning service of the orthodox rite, where they were originally inserted as a polemic against heretical sectarians who did not follow the orthodox rules for interpreting scripture. The rules are printed in all editions of the orthodox prayer book. The *Siddūr Ha-šālēm* (*ed.* Greenberg, New York 1949; 1977 ed. at pp. 42-46), lists all the rules (known as the thirteen principles of exegesis) together with several illustrations of their application. See also M. Elon, *Principles of Jewish Law*, col. 64 ff.

163. This category included only the first three of R. Ishmael's principles: (1) inference *a fortiori*; (2) inference from analogous languages in two passages; (3) application of a general principle stated in one or two biblical laws, to all related laws.

In addition to the foregoing, *heqqēš* likewise belongs to the category of rules of analogy. However, it may have evolved after R. Ishmael's time, since it is not included among his thirteen principles. As noted, *heqqēš* is used extensively throughout the Talmud, and can hardly be a late development, since it is also found in the halakic

hypothesis that *qiyās* was based directly on the Hellenistic model, in which these distinctions are clear. On the other hand, the fact that the Talmud simply applies the rules *ad hoc*, without abstract discussion of the categories, argues for the possibility that Shāfiʿī learned the rules (without the categorization) through direct or indirect exposure to talmudic argument, and later introduced them indiscriminately under the heading of *qiyās*, which should properly have been reserved for arguments by analogy alone.[164]

Shāfiʿī's discussion of *qiyās* employs one locution which is worth noting both for its content and for its peculiarity of style. He asserts that one may not use *qiyās* to deduce a further rule from a rule which was itself deduced by *qiyās*.[165] This very question was the subject of a talmudic dispute between the schools of R. Ishmael and R. Akiva in the second century, R. Ishmael holding that one may not use *heqqēš* to derive a rule from an earlier rule so derived.[166] Shāfiʿī's statement of the rule is interesting not only for its equivalence to the talmudic rule, but also because he here uses the term *sharīʿa*, in a manner seemingly unique among early Muslim jurists, to denote an individual legal rule (as opposed to *the sharīʿa, i.e.*, the whole corpus of Islamic legal tradition). This usage parallels talmudic usage, in which "*the halākā*" denotes the whole corpus of Jewish law while "*a halākā*" means any single rule of the *halākā*.

The many correspondences between Shāfiʿī's exegetical rules and those of the Talmud, as well as the other parallels delineated here, raise the obvious problem of explaining these similarities. Within Islamic jurisprudence, Shāfiʿī's genius lay, as Coulson has said, "in giving existing ideas a new orientation."[167] Yet it is clear that both the ideas *and* the orientation had preceded Shāfiʿī in another time and place.

CONCLUSION

> Shāfiʿī's legal theory is a perfectly coherent system, superior by far to the theory of the ancient schools . . . It was the achievement of a powerful

midrāshīm (exegetical commentaries dating from about the fourth century A.D.). R. Brunschwig, "Herméneutique Normative Dans le Judaisme et dans L'Islam," *Accademia dei Lincei: Scienze Morale, etc., Rendiconti* 30 (1975), *fasc.* 5-6, pp. 233-252), at p. 246, notes that the omission of *heqqēš* from the thirteen principles has not been adequately explained. Brunschwig's article is an interesting analysis of resemblances and differences between Jewish and Islamic exegesis.

164. Shāfiʿī's expansion of the scope of the term *qiyās* beyond pure analogizing is yet another indication of the misborrowing of the term from talmudic *heqqēš*. Had the true root, *n-q-š*, been recognized, it would have been obvious that *heqqēš* meant "analogy" and thus could not include other forms of logic.

165. *lā tuqās sharīʿa ʿalā sharīʿa*, "rule upon rule may not be deduced by *qiyās*." *Kitāb al-Umm*, vol. 7, cited in Schacht, *Origins*, p. 124.

166. "A thing learned by *heqqēš* cannot turn around and teach by *heqqēš*." *b. Zebāhīm 49b.*

167. Coulson, *History*, p. 61.

mind, and at the same time the logical outcome of a process which had begun much earlier.[168]

The present study had two objectives: (1) to investigate some striking parallels between the roots of Islamic law and the sources of talmudic law: (2) to examine the jurisprudence of Muḥammad b. Idrīs al-Shāfiʿī against the backdrop of the Babylonian Talmud.

Linguistic and conceptual parallels were found between the roots of Islamic law and the corresponding talmudic phenomena. Significant parallels were noted between Shāfiʿī's theory (which became the basis of classical Islamic jurisprudence) and several basic talmudic concepts. These correspondences raise a number of hypotheses, in particular, the probability of direct or indirect talmudic influence on the Islamic system in its incunabula.

1. *Islamic Roots: A "Talmudic Transplant"?*

What conclusions can be drawn, or hypotheses advanced, from the material presented here? Was the historical development of Islamic law a phenomenon totally independent of Jewish law? Are the parallels simply the result of cultural convergence? If the resemblance is no accident, did it stem merely from the cultural affinity of Arab and Jew as speakers of cognate languages and heirs to a shared theocratic tradition? Or was it primarily the result of a common environment, influenced by the customary law of the former Persian Empire (the birthplace both of the Babylonian Talmud and the Ḥanafī school of Islamic law)? And last but not least, was there any conscious borrowing from their Jewish counterparts by pre-classical Muslim jurists, or by Shāfiʿī in particular? Is this, in a word, an instance of what Alan Watson has felicitously called "legal transplants"?[169]

In considering this last question, the possibility of separate development is not ignored. Jewish and Islamic law are, after all, theocratic systems in which God's law was initially "revealed" to a prophet in a scripture. In such systems, the options for further development are severely circumscribed by the basic tenet that God alone can make or repeal laws. Yet revealed laws are obviously finite in number and cannot hope to cover all future contingencies. Hence, theocratic systems must evolve a doctrine that will give automatic divine sanction to extra-scriptural rules promulgated by those

168. Schacht, *Islamic Law*, p. 48.

169. A. Watson, *Legal Transplants* (Charlottesville, Va., 1974). Curiously, the possible "transplanting" of parts of talmudic law into Islamic law is not even mentioned there, even though the historico-cultural background would appear to fit Watson's parameters more closely than most of the examples he does discuss.

charged with that task. In Judaism and Islam, those so charged are the sages (rabbis or *'ulamā'*) who deduce the ramifications of the law by studying the sacred texts. The chain of transmission in direct line from a prophet is an obvious solution; but since God is perceived as the only legitimate source of law, this must be coupled with a dogma that the rules thus transmitted really come not from the prophet but from God Himself.

Thus far, the general resemblance between Jewish and Islamic law is readily explained by the common theocratic basis. In Islam, the premise of God as lawgiver is based on Old Testament doctrines as expounded in the Qur'an. In the most general sense, the Islamic theocracy can be said to have evolved from the Jewish model, so that at the very least the case is one of parallel development with some initial borrowing. [170]

The data, however, indicate something more than merely the initial adoption of Jewish theocratic doctrine. The parallels discussed here seem to refute the view that beyond the basic premise of God as lawgiver the early development of Islamic law was completely independent. It is thus worthwhile to examine the evidence for explanations based on common cultural origins, common historical environment and possible direct borrowing by the younger system from the older.

The common cultural origins of Jew and Muslim may explain many similarities. Arabs and Hebrews spoke closely related tongues. For thousands of years they had inhabited the same part of the world, with common mythic traditions and ethnic customs. With the advent of Islam, this common semitic foundation was overlaid with ideas from Judaism (some directly and others *via* Christianity). It would be surprising indeed if there were no resemblance between Jewish and Islamic law. As the writer shows elsewhere, the correspondence in substantive rules of law is most marked with respect to basic sociocultural phenomena that were most closely associated with religion in ancient times: the laws of family, status and inheritance.[171]

As Snouck Hurgronje pointed out, it is difficult to separate the influence of common origins from that of shared geohistorical environment;[172] but some features of that environment in the period in question may be highly significant. First and foremost, Islamic law followed hard on the heels of talmudic law in the same part of the world and subject to the same cultural influences. In particular, the Ḥanafī school's birthplace, Kufa, was on the same Euphrates trade

170. Crone and Cook, *Hagarism*, *passim*, develop this view in great detail.

171. See Judith Romney Wegner. "The Status of Women in Jewish and Islamic Marriage and Divorce Law," 5 *Harvard Women's Law Journal*, no. 1 (Spring 1982) pp. 1-33.

172. *Selected Works*, p. 75.

route as the two talmudic academies of Sura and Pumbedita, which flourished from the third to the tenth centuries. The prime sociocultural influence in the region was undoubtedly that of the former Persian Empire. The *lingua franca* of Iraq throughout the period was, as noted, Aramaic. Resemblances between (for instance) Islamic and talmudic rules of contract and commercial law may well be explained by the necessarily international character of commercial law along the trade routes of the Fertile Crescent.

When, however, we move from a comparison of substantive legal rules to a more global comparison of the juristic philosophy which underpins the two systems, we are in a sphere where systematic borrowing cannot be so readily discounted. Detailed similarities in legal theory inevitably raise the possibility of borrowing by the younger system from the older. Here, that hypothesis is supported by extensive correspondence in the technical terminology. It is immeasurably strengthened when we find the younger system fabricating a term like *qiyās* (from a root not native to its own or any semitic language), for which the only logical explanation is linguistic corruption of a widely-used talmudic term. When correspondences in *form* (language) are matched by correspondences in *function* (the place of the concepts in the overall scheme), the likelihood of pure coincidence becomes still less. And when the younger system's *own tradition* perceives analogies like ᶜUmar's equation of a written Sunna with "the Mishnah of the Jews," strident disclaimers of any possible connection betray a certain lack of objectivity.[173] Clearly the early Muslim jurists had both motive and opportunity to follow the Jewish model in developing their embryonic system; and the parallelism between the four roots of Islamic law and their talmudic counterparts suggests that in the early stages, the talmudic model, though not overtly adopted, was consciously or subconsciously adapted to Islamic needs.

173. See, for instar → G.M. Badr, "Islamic Law: its Relation to other Legal Systems," 26 *Amer. J. Comp. Law* (1978), p. 187 at 193-195. Badr asserts that "no solid evidence" has been adduced (he presumably means "by comparative lawyers") to support the contention that Jewish law influenced the earliest development of Islamic jurisprudence. However, as the present writer will show in detail elsewhere, Badr's arguments range from the incorrect to the irrelevant. Thus, his reference to Muhammad's expulsion of the Jews from Medina to "prove" that the Jews can have had no influence on Islamic law not only ignores the immense body of scholarship on the Jewish sources of Islamic religious law, but also mistakenly assumes that Islamic jurisprudence originated in seventh-century Medina, whereas Goldziher and Schacht have shown conclusively that it originated in eighth-century Iraq. Again, Badr seems to assume that the wellknown influence of Islamic jurisprudence on Jewish law as practiced in the lands of Islam in the *twelfth* century somehow negates the possibility that the fully-developed talmudic system had influenced the fledgling Islamic jurisprudence *four centuries before*. In so doing, Badr is guilty of the very fault he castigates at p. 193: "[The researcher] must also be a good historian, otherwise his poor history would make a mockery of his knowledge of the law."

One problem is the absence of any reference to foreign sources in Islamic legal texts. But this is by no means conclusive; there are well-known doctrinal reasons, outside the scope of this study, which would sufficiently account for the expunging of any overt acknowledgment of foreign influence (Jewish or otherwise) from works of *ʿilm* and *fiqh*.[174] Such deletions would certainly have been made in the eighth century, at the time of the victory of the "Arabic Qur'an" faction in the disputation over the nature of the Qur'an; so the fact of borrowing would have been quite forgotten by the end of the ninth century, when the classical theory evolved.

2. *Shāfiʿī's Jurisprudence: A "Talmudic Synthesis"?*

We saw how Shāfiʿī, at the turn of the ninth century, took the four roots *qur'ān, sunna, ijmāʿ* and *qiyās* and wove them into a theory of Islamic jurisprudence, thereby bringing these concepts and their interrelationships even closer to their talmudic counterparts. Shāfiʿī's overall conception follows the talmudic system so closely as to raise a hypotheses of conscious borrowing of the entire basic scheme. Let us briefly recapitulate the evidence.

Before Shāfiʿī, the Qur'an had been seen as the sole *divine* source of Islamic law. Its status as a root of law for Muslims was precisely that of the Torah for Jews (as declared in the Qur'an itself). As for the correspondence of Sunna and Mishnah as vehicles of oral tradition, this too was touched on in Muslim tradition. But no one before Shāfiʿī had suggested that the Sunna, like the Qur'an, was of *direct divine provenance*. It was Shāfiʿī who, equating Sunna with *ḥikma* (just as the Mishnah, the traditions of the Jewish *ḥakāmīm*, was *ḥokmā*) first declared that God had "sent down" the Sunna through Muhammad along with the Qur'an (just as the first chapter of the Talmud declares that Moses received the Mishnah along with the Torah at Sinai). It was Shāfiʿī who first called Qur'an and Sunna *al-aṣlān*, "the twin roots," a coupling which echoes the linkage of *miqrā u-mišnāh* and *qōrē we-šōnēh* (likewise found in the first chapter of the Talmud).

Shāfiʿī's postulation of the divinity of the Sunna was essential to the promotion of his goal: a single, unified Sunna of Islam that would supplant the conflicting traditions of separate schools. Here, we may ponder cause and effect. Was Shāfiʿī's advocacy of a self-consistent

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174. See note 19 and 34 above. See also R. Bell and W.M. Watt, *Introduction to the Qur'ān* (Edinburgh, 1970, 1977 ed.) p. 84. In particular, one would certainly not expect to find such an acknowledgment by Shāfiʿī, who is said by the mediaeval exegete Suyuṭī to have been expecially vehement in his denial of the existence of foreign elements in the Qur'an. *Al-Itqān fī ʿUlūm al-Qur'an* (Calcutta, 1852-54), p. 315.

Sunna merely the logical outcome of its claimed divinity; or did he make that claim specifically in order to advance the unification of Islamic law? Or could his motivation have been, at least in part, that of the sages of the Talmud: to give the divine *fiat*, both to traditional pre-Islamic *sunna* transmitted through Islam and to new rules formulated by scholars to fill the *lacunae* of Holy Writ? Either way, Shāfiʿī's theory effected a change in the early view of *sunna* and made the relationship of Qur'an and Sunna identical to that of Miqra and Mishnah as expressed in the Talmud.

Shāfiʿī's redefinition of the concepts of *ijmāʿ* and *qiyās* and their place in the system followed inexorably from the doctrine of the divinity of the Sunna. A unified and self-consistent Sunna could not be achieved as long as *ijmāʿ* meant only the local consensus of separate schools. Shāfiʿī's postulation of a single, unified *ijmāʿ* of Islam brought the concept of *ijmāʿ* closer to the talmudic consensus, whose object was to establish a single, unified *halākā*. His doctrine of the popular *ijmāʿ*, as we saw, echoed the very language of the talmudic version of *vox populi, vox Dei*. Furthermore, Shāfiʿī's pragmatic acceptance of a majority-based scholarly consensus, where unanimity could not be had, echoes the talmudic practice of recording dissents while setting the majority ruling as the halakic norm. (The principle of following the majority, as we saw, is found in the first chapter of the Talmud along with the other basic postulates mentioned above; while that of following the unanimous popular consensus appears in the sixth chapter of the tractate).

Next, Shāfiʿī's reversal of the traditional order of *qiyās* and *ijmāʿ* elevated *ijmāʿ* to the status of a third substantive root of law, to stand beside *qur'ān* and *sunna* and validate by consensus rules not found in either of the "twin roots." Here, too, is a parallel between *ijmāʿ* and the Gemara; for the latter, upon its completion, became a repository of consensual rulings to be consulted as a third source of law supplementing Torah and Mishnah.

Finally, Shāfiʿī's treatment of *qiyās* showed a number of parallels with the Talmud. Just as the talmudic use of prescribed rules of exegesis (*heqqēš* and other forms of logic) was more conducive to consensus than the arbitrary use of individual *re'āyā*, so Shāfiʿī's promotion of *qiyās* over *ra'y* aimed to achieve a similar effect. And it was Shāfiʿī who expanded the scope of Islamic *qiyās* by introducing several talmudic-style arguments, notably those of "greater and less," "general and specific" and "deduction from context." (Once more we note that applications of these rules are found in the first tractate as well as throughout the Talmud).

In documenting these parallels between Shāfiʿī's jurisprudence and that of the Talmud, an interesting coincidence was observed: Shāfiʿī's fundamental innovations are not found scattered throughout the Talmud, but *all appear in the first tractate, and moreover (with one exception) in the very first chapter. Tractate*

Berākōt contains the doctrine of the divinity of the oral law, the coupling of written revelation and oral tradition as divine sources of law, the validation of legal rulings based on a majority view, and the validation of popular consensus as a source of law in the absence of written or oral tradition. Except for the last-named principle, which appears later in the tractate, *every one of these ideas is explicitly stated in the first nine folios (seventeen pages) of the Talmud.*[175]

The significance is clear. Any Muslim scholar who chose to follow the qur'anic injunction to "ask those who read the scriptures before you" could have consulted the Talmud, perhaps with the aid of an Arabic-speaking Jew or an Aramaic-speaking Iraqi Muslim jurist (Shāfiʿī, we know, traveled widely in Iraq). Such a scholar would have to peruse (or listen to) only the first few talmudic pages to find most of the major innovations which Shāfiʿī introduced into Islamic law.[176] It happens that *Tractate Berākōt* was and is traditionally studied by all classes of Jews, laymen as well as scholars;[177] so these concepts would have been even more accessible to Muslim scholars in general, and to Shāfiʿī in particular, than might be supposed. The discovery of these ideas would have entailed no great investment of time or effort, nor even firsthand knowledge of the language of the talmudic text.

The key doctrine of the divinity of the Sunna is rightly considered "the supreme contribution of Shāfiʿī to Islamic jurisprudence."[178] Yet it is unequivocally talmudic. It could, of course, be argued that Shāfiʿī arrived independently at this notion, which is the lynchpin of his system as of the talmudic scheme. But if so, what are the odds that he would have formulated it in such "talmudic" terms? He could, for instance, have simply claimed that, because of the Prophet's divine inspiration and frequent visitations

175. More accurately, the first *fifteen* pages, since Talmudic tractates are numbered starting at folio 2, so as to leave folio 1 for a title page. As noted earlier, the doctrine of the divinity of the oral law appears at *b. Berākōt 5a*; the coupling of *miqrā* and *mišnāh* first appears at *5a*, and of *qōrē we-sōneh* at *4b*; the rule of following the juristic majority appears at *9a*; and the rule of following the unanimous popular consensus at *46a*.

176. This includes those listed in the preceding note as well as instances of the rhetorical argument *a fortiori* at *5a*, *14a* and *15b*.

177. The religious duty of studying Talmud, incumbent on all male Jews, explains the high rate of literacy among Jews throughout the past 2,000 years. Laymen from all over the Diaspora would, until the tenth century, flock twice a year to the talmudic academies of Sura and Pumbedita for the "months of study" held there before Passover and New Year. Today, the proportion of orthodox in the total number of Jews is rather small, but *Tractate Berākōt* is still studied by laymen; the writer's four sons, at about age 13-14, learned sections of it as a routine part of their Jewish education.

178. Coulson, *History*, p. 56.

from God (who revealed the Qur'an piecemeal over many years) traditions traced back to him must be assumed to have divine sanction. Yet Shāfiʿī selected *precisely* the talmudic formulation, stating that God actually *sent down* the Sunna directly to Muhammad along with the Qur'an (just as God gave the oral law to Moses at Sinai along with the Torah). Such an identity of formulation belies coincidence; taken together with the many other meeting points of Shāfiʿian and talmudic doctrine, it rouses at least a suspicion of systematic borrowing.[179]

It is not easy to pinpoint juristic influences on the *Risāla*, especially since, as Khadduri notes, Shāfiʿī does not refer therein to any books he may have read. Khadduri, of course, is speaking of *Muslim* sources; *a fortiori*, Shāfiʿī would not have mentioned Jewish or other foreign sources for reasons already discussed. (Indeed, Shāfiʿī himself was the most vehement denouncer of those who were willing to concede the influence of foreign sources).[180] Certainly Khadduri's belief that "Shāfiʿī's main inspiration was derived from the intensive debate with Ḥanafī jurists in Iraq"[181] does not preclude the possibility that he was there exposed, directly or indirectly, to other influences as well. Even more significant is Khadduri's comment, that the impression given by historical sources that Shāfiʿī produced the *Risāla* "virtually on the spur of the moment" is belied by the great originality of the work, which must surely have been years in the making.[182] If Shāfiʿī had tapped a ready-made but unacknowledgeable source, as here proposed, the apparent speed of the book's production would of course be far more plausible.

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179. That suspicion is shared with the present writer by Crone and Cook (*Hagarism*, pp. 31-32), who note that Shāfiʿī's notion of the divinity of the Sunna "like so much else, makes its first appearance in Babylonia, and can be related in peripheral fashion to earlier rabbinic notions" (p. 32, and see note 31 thereto). Crone and Cook claim that Shāfiʿī's "solution," which promoted the construction of elaborate *isnāds* tracing traditions back to the Prophet, made the Muslim equivalent of *halākā le-Mōsheh mi-Sinai* ("laws given to Moses at Sinai") far more basic to Muslim than to Jewish tradition. But surely the notion itself is no more *basic* in Islam than in Judaism; in both, it is the lynchpin of the entire system. It is true that "the few Mosaic *isnāds* which the Rabbis concocted look pretty forlorn by the standards of Islamic *isnād*-criticism (*Ibid.*, p. 182, n. 31); but I would argue that this difference may well result from Shāfiʿī's injecting this "borrowed" Jewish idea into Islam at an earlier stage than it would naturally have developed. Thus, Muslim scholars of Shāfiʿī's day needed to go back less than 200 years in constructing their *isnāds*, whereas the *mishnaic sages* would have had the impossible task of concocting detailed *isnāds* going back 1,500 years to the Exodus — an event which (assuming its historicity) was obviously lost in the sands of time.

180. See note 174 above.

181. *Shāfiʿīs Risāla*, p. 27.

182. *Ibid.*, p. 21.

The present study suggests possible directions for further research. These include (1) more detailed comparison of Shāfiʿī's terminology with the language of the Talmud; (2) more detailed investigation of the correspondences between Islamic and talmudic law in substantive areas, such as family law, civil law and the laws of evidence and procedure. Such research may shed some light on the obscurity of pre-Islamic Arabian culture, and may well help to determine precisely which rules of Islamic law come from ancient Semitic custom. It may even help to support (or refute) the present thesis.

A *caveat* is in order. Severe limitations are imposed by the paucity of early Islamic legal materal and the complete lack of pre-Islamic Arabian legal texts. Research is further hampered by the probability that doctrinal considerations led to the expunging of any references to foreign sources from the early legal texts. The evidence may therefore remain, at best, no more than circumstantial, even if it should prove sufficient to satisfy an impartial jury beyond a reasonable doubt. We may never know for sure if Shāfiʿī sat, literally or metaphorically, at the feet of talmudic sages — just as we may never know for sure if the Caliph ʿUmar "had a Jewish lawyer at his elbow."