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# ARTICLES

## Islamic Law: The Impact of Joseph Schacht

David F. Forte\*

For a little over a century, Islamic law has suffered progressive shocks and disruptions at the hands of modernism. Muslim legal scholars in Middle Eastern states and elsewhere have seen their sacred Shari'a restricted, modified, distorted, or simply replaced by modern Western legal codes.<sup>1</sup> The reforms began in a piecemeal fashion, but recently, there have been wholesale importations of foreign law.<sup>2</sup> Both Westerners and reformist Muslims have conceded that the very nature of Islamic law and its consequent rigidity have made much of it irrelevant to modern society.<sup>3</sup> The reform, though, has not been unopposed. Throughout Islam, traditionalist groups constantly rise in an effort to restore the Shari'a to its "rightful place" in the legal order. Some of these groups represent a threat to the legitimacy of modern regimes.<sup>4</sup>

Many learned Muslims were unhappy with the imposition of the modern codes. But worse was to come. Already buffeted by the trends of Western legalism, Muslims found themselves faced with

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1. See generally Schacht, *Islamic Religious Law*, in *THE LEGACY OF ISLAM* 393 (J. Schacht and C. Bosworth eds. 1974) [hereinafter cited as *Islamic Religious Law*].

2. See generally J. ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* (1976) [hereinafter cited as *LAW REFORM*]; J. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* (1959) [hereinafter cited as *ISLAMIC LAW*]; Bonderman, *Modernization and Changing Perceptions in Islamic Law*, 81 *HARV. L. REV.* 1169, 1177-89 (1968).

3. S. VESKY-FITZGERALD, *MUHAMMADAN LAW* 8 (1931); Kourides, *Traditionalism and Modernism in Islamic Law: A Review*, 11 *COLUM. J. TRANSNAT'L L.* 491, 497-505 (1972).

4. In Egypt, President Anwar Sadat must contend with right-wing religious groups which desire to return to the fundamental principles of Islam. See F. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM IN MODERN EGYPT* 146-47 (1968); Forte, *Egyptian Land Law: An Evaluation*, 26 *AM. J. COMP. L.* 273-74 (1978). Opposition to the Shah of Iran's modernization program comes from diverse groups which "have allied themselves with the Mullahs, or clergy, of the conservative (Shi'ite) sect that dominates Iran." *N.Y. Times*, June 4, 1978, § 1, at 1, col. 3.

an even more serious challenge to their principles. From the pen of the proverbial academic scribbler came an analysis which undermined one of the most fundamental bases of Islamic law. In the 1950's and 1960's, Joseph Schacht published the results of his researches into the Traditions of the Prophet.<sup>5</sup> Until his death in 1969, Schacht insisted that his conclusions only confirmed the original hypothesis of Ignaz Goldziher and the independent investigations of Schacht's contemporary, Professor Brunschvig.<sup>6</sup> Goldziher's views, though, were substantially ignored, while Schacht, not Brunschvig, is considered the true author of this historic revision.

If Schacht's views are correct, then a fundamental rethinking of Islamic law is in order. And if Islamic Law is to be rethought, then Muslim society itself may be in for a watershed change. Islamic law is not merely one aspect of Muslim civilization. Rather, it is the acknowledged crown of Islamic society, the queen of Islamic sciences. It is "the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself."<sup>7</sup> What theology is for the Christian, law is for the Muslim.<sup>8</sup> Despite the internal variations in interpretation, Islamic law has been the factor which has made that religion into a world-wide social force. In its classic formulation, it continues to encompass nearly all aspects of Muslim life.<sup>9</sup>

## I. CLASSICAL THEORY OF ISLAMIC LAW

Muslims regard the fundamental sources of Islamic law as divine in origin. The law provides the vehicle for transmitting the

5. J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1964) [hereinafter cited as INTRODUCTION]; J. SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (1950) [hereinafter cited as ORIGINS]; *Islamic Religious Law*, *supra* note 1; Schacht, *Modernism and Traditionalism in a History of Islamic Law*, 1 MIDDLE EAST STUD. 388 (1965) [hereinafter cited as *Modernism and Traditionalism*]; Schacht, *Pre-Islamic Background and the Early Development of Jurisprudence*, in 1 LAW IN THE MIDDLE EAST 28 (M. Khadduri & H. Liebesny eds. 1955) [hereinafter cited as *Pre-Islamic Background*]; Schacht, *Foreign Elements in Ancient Islamic Law*, 32 J. COMP. LEG. & INT'L L., 3d ser., 9 (Parts III & IV, 1950) [hereinafter cited as *Foreign Elements*].

6. *Modernism and Traditionalism*, *supra* note 5, at 388. Goldziher's theory of the Traditions of the Prophet is found in 2 I. GOLDZIHNER, MUSLIM STUDIES 17-251 (1966).

7. *Pre-Islamic Background*, *supra* note 5, at 28. See also H. GIBB, MOHAMMEDANISM 7-8 (2d rev. ed. 1970); *Islamic Religious Law*, *supra* note 1, at 392.

8. See generally W. SMITH, ISLAM IN MODERN HISTORY 57 (1957).

9. Coulson, *Islamic Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 54 (J. Derret ed. 1968). J. N. D. Anderson notes that "personal and family law . . . together with the rules of ritual and religious observance, has always been regarded as the very heart of the Shari'a." ISLAMIC LAW, *supra* note 2, at 15.

message heard by Mohammed to present day believers.<sup>10</sup> The Shari'a comprehends all rules textually derived or analytically deduced from divine legislation which regulate the Muslim and his community. Of the four main sources of the Shari'a<sup>11</sup> — the Qur'an, the Sunna (the practice of the Prophet), *ijma* (consensus of the community), and *qiyas* (analogical deduction) — the Qur'an and the Sunna provide the fundamental basis for the commands of the Shari'a.<sup>12</sup> The Qur'an and the Sunna are the twin cornerstones upon which the whole edifice of Islamic law is constructed. Together, *qiyas* and *ijma* produce the bulk of the actual positive rules of law,<sup>13</sup> but both techniques can only be based on the commands of the Qur'an or the Sunna and cannot produce regulations in contradiction to those two sources.

All Muslims accept the Qur'an as the primary and direct source of divine law. The Qur'an, however, is not a code of laws; its legal component is relatively small. Out of approximately 6300 verses, only 600 deal with legal issues.<sup>14</sup> In toto, there are around 240 legal prescriptions in the Qur'an.<sup>15</sup>

The Qur'an embodies the divine law which "co-existed with God Himself in a heavenly book, known as the 'Mother Book,'"<sup>16</sup> written in Arabic from all eternity.<sup>17</sup> As problems arose for Mohammed in his mission, parts of the Mother Book were revealed to him. A few orthodox Muslim scholars cling to the belief that the Qur'an's legal prescriptions are totally divine and unrelated to previous legal custom,<sup>18</sup> but it is clear from the content of the Qur'an that Mohammed was attempting to reform much of pre-Islamic Arabian law. Indeed, pre-Islamic Arabian law is the tablet on which the Qur'an wrote a more highly developed moral and legal sense.<sup>19</sup>

10. See N. COULSON, *CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE* 4 (1969) [hereinafter cited as *CONFLICTS AND TENSIONS*]. See generally S. MAHMASSANI, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM [FALSAFAT AL-TASHRI FI AL-ISLAM]* 5 (1961).

11. This discussion is confined to the doctrines espoused by the Sunni (orthodox) Muslims.

12. H. GIBB, *supra* note 7, at 62-63.

13. LAW REFORM, *supra* note 2, at 178.

14. N. COULSON, *A HISTORY OF ISLAMIC LAW* 12 (1964) [hereinafter cited as *HISTORY*]; L. MILLIOT, *INTRODUCTION A L'ETUDE DU DROIT MUSULMAN* 106 (1953).

15. S. RAMADAN, *ISLAMIC LAW: ITS SCOPE AND EQUITY* 33 (1961).

16. Khadduri, *Nature and Sources of Islamic Law*, 22 *GEO. WASH. L. REV.* 3, 6 (1953).

17. *ISLAMIC LAW*, *supra* note 2, at 11.

18. S. HASSAN, *THE RECONSTRUCTION OF LEGAL THOUGHT IN ISLAM* 21 (1974). This viewpoint is championed by the Shi'ite sect. LAW REFORM, *supra* note 2, at 10; Khadduri, *supra* note 16, at 3; Robson, *Tradition, The Second Foundation of Islam*, 49 *MUSLIM WORLD* 22, 25-26 (1951).

19. A. RAHIM, *THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAFI'I, AND HANBALI SCHOOLS* 1 (1963).

Although it seems odd that the permanent Mother Book of divine law should contain precepts of a highly parochial character, most Muslim legists have accepted the view that pre-Islamic law forms a large part of the Qur'anic legal order.<sup>20</sup>

The second fundamental source of law is the Sunna of the Prophet. "Sunna" is a term of pre-Islamic Arabia meaning "custom of the community."<sup>21</sup> As applied to Mohammed, it means that Muslims are obligated to follow what he did, what he said, and practices which he tacitly consented to.<sup>22</sup> Because God appointed Mohammed as His messenger, Muslims regard the Sunna of the Prophet as indirect divine revelation.<sup>23</sup>

Classic Islamic doctrine holds that for the first decades following the death of the Prophet in 632 A.D., the Sunna was followed by Mohammed's Companions and Followers, who had an intimate memory of what the Prophet had done.<sup>24</sup> Few if any of Mohammed's examples were written down.<sup>25</sup> However, towards the end of the first Islamic century, it became necessary to begin recording what Mohammed had said, done, or permitted to be done. These records were called the "Traditions of the Prophet" (*hadith*, pl. *ahadith*). Eventually, the *ahadith* became the only reliable means to determine what composed the Sunna of the Prophet.<sup>26</sup>

Towards the middle of the second Islamic century, compilations of traditions began to appear. The early compilations contained relatively few traditions. The *Muwatta* of Malik (compiled around 130-140 A.H.) for example, contains roughly 600 traditions, reaching back to the Prophet. By contrast, a later compilation by

20. AZIZ AHMAD, *ISLAMIC LAW IN THEORY AND PRACTICE* 2 (1956); *LAW REFORM*, *supra* note 2, at 10.

21. H. GIBB, *supra* note 7, at 73.

22. These are known as the *Sunnat-al Qual*, the *Sunnat-al Fil*, and the *Sunnat-al Taqdir*. S. MAHMASANI, *supra* note 10, at 71; AZIZ AHMAD, *supra* note 20, at 29. See M. QURESHI, *ISLAMIC JURISPRUDENCE* 40 (1970); AQL AHMAD, *A TEXT BOOK OF MOHAMMADAN LAW* 15 (4th rev. ed. 1966).

23. G.H. BOUSQUET & J. SCHACHT, *SELECTED WORKS OF C. SNOUK HURGRONJE* 269 (1957); AZIZ AHMAD, *supra* note 20, at 29; M. QURESHI, *supra* note 22, at 12.

24. H. GIBB, *supra* note 7, at 50; A. IBRAHIM, *ISLAMIC LAW IN MALAYA* 13 (1965).

25. There are conflicting reports. One traditional story holds that Mohammed forbade the writing down of the traditions lest they be confused with the work of God in the Qur'an. See S. MAHMASANI, *supra* note 10, at 71. Another report states that the Companions actually had some of the traditions burned. S. YAQUB SHAH, *ISLAMIC JURISPRUDENCE IN THE LIGHT OF THE QUR'AN AND SUNNAH* 18, 20 (1971). On the other hand there is the assertion that over 250 traditions were inscribed in the Prophet's presence. See A. GUILLAUME, *THE TRADITIONS OF ISLAM* 16 *et. seq.* (1924).

26. P. HITTI, *ISLAM, A WAY OF LIFE* 42 (1970) [hereinafter cited as *ISLAM*]. See A. HASAN, *THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE* 49 (1970).

Hanbal near the end of the second Islamic century included 50,000 traditions.<sup>27</sup>

The traditions were written in the form of transmission, with the most recent relator placed first, the source he received it from next, then that source's source, and so on back to Mohammed. The chain of transmission (called *isnad*) soon became the litmus test of authenticity.

Faced with a burgeoning number of purported traditions, the Muslim legists developed a special branch of study: "the science of impugment and justification."<sup>28</sup> *Hadith* scholarship became the highest form of Muslim learning.<sup>29</sup> Using a number of criteria, the jurists hoped to screen out authentic traditions from the apocryphal, for it became and continues to be a central tenet of Islamic jurisprudence that authentication is not a matter of faith but of human investigation and verification. The content of authenticated traditions must be accepted as indirect revelation, but the process of authenticating the traditions is purely human. This scientific doctrine becomes a central point once we turn to Joseph Schacht's recent researches.

The Muslim *hadith* scholars investigated the lives of those who were transmitters to ensure that they were reliable and pious men. They checked to see whether the *isnad* was continuous back to the Prophet, or whether there was a gap. They sought traditions with a number of parallel transmissions. As a result, the *hadith* scholars developed certain classifications by which the strength of various traditions could be determined.<sup>30</sup> All the orthodox legal schools of

27. M. QURESHI, *supra* note 22, at 45.

28. H. GIBB, *supra* note 7, at 52.

29. P. HIRTI, *HISTORY OF THE ARABS* 393 (10th ed. 1970).

30. The classification regarding legal force falls into two groupings: those *ahadith* which are the source of *obligatory rules*, and those whose derived rules are merely *persuasive*. Traditions which have in their *isnads* many Companions and Followers are termed *continuous*; those with few Companions and many Followers are called *famous*; and those with only a number of Followers in the chain are designated *isolated*. Traditions may also be classed as *connected*, with a continuous *isnad*; and *disconnected*, with a gap in the chain. To be authentic, a tradition should meet various tests: 1) the tradition had to be present in all three classic periods, that of the Companions, the Followers, and the followers of the Followers; 2) a narrator had to be a Muslim, of sound mind, important, and possessing of judgment, good memory, and good character; 3) narrations of famous persons were preferred, as were narrations of jurists over non-jurists; 4) a narration had to be in conformity with the Qur'an, the other parts of the Sunna, and the actions of the Companions; 5) the tradition had to be plausible; and 6) an "innovative" tradition was invalid. M. QURESHI, *supra* note 22, at 42-44. After all these tests were applied, the final classifications of the traditions were in groups called *sound*, *good*, and *weak*. H. GIBB, *supra* note 7, at 53. See also Robson, *Tradition: Investigation and Classification*, 49 *MUSLIM WORLD* 98 (1951).

Islam accept the authenticated traditions as binding, but they differ as to which *isnad* classifications are sufficiently justified to be called genuine.

By the third Islamic century, the final authoritative collections were completed. The six collections were those of al-Bukari, Muslim, Abu Dawud, al-Nasai, al-Tirmidhi, and Ibn Maja. Al-Bukari reportedly sifted through over 200,000 traditions to select and categorize less than 3,000.<sup>31</sup> Despite the pruning, however, those traditions still considered authentic form a very large number, and it is from them that the great bulk of the rules of the Shari'a are derived, by way of the interpretive devices of *qiyas* and *ijma*.<sup>32</sup>

*Qiyas*, as noted above, is the third source of Islamic law. It is a structured method of analogy by which rules are applied to new situations by reference to other previous rulings. It is a form of legal reasoning common to all advanced legal systems. Although no rule reached by *qiyas* may contradict a specific command of the Qur'an or the Sunna, it does provide a more flexible method of coping with new problems.

*Ijma*, on the other hand, has constricted the development of

31. H. GIBB, *supra* note 7, at 54.

32. Many traditions refer to religious practices. For example, Gibb reports one as follows: Uqba ibn Amir said 'Someone sent the Prophet a silk gown and he wore it during the prayers, but on withdrawing he pulled it off violently with a gesture of disgust and said "This is unfitting for Godfearing men."'

H. GIBB, *supra* note 7, at 51.

Others are strictly legal, as for example the famous *hadith* limiting bequests to one third: Sa'd bin Waqqas said: 'The Messenger of Allah used to visit me at Mecca, in the year of the farewell pilgrimage because of my illness which had become very severe. I said: "My illness has become very severe and I have much property and there is no one to inherit from me except a daughter. Shall I bequeath two-thirds of my property to a charity?" He said: "No." I said: "Half?" He said: "No." Then he said: "Bequeath one-third and one-third is a great deal, because if you leave your heirs free from want it is better than if you leave them in want, begging of other people . . . ."

Quoted in H. LIEBESNY, *THE LAW OF THE NEAR AND MIDDLE EAST* 181-82 (1975).

Some relate to the character of the times with a content both poignant and tragic: Bukari [there follows a long chain in the *isnad*] from Ibn 'Umar: "They brought the Prophet, on whom be God's benediction and peace, a Jew and a Jewess who had committed fornication. He said to them: "What do you find in your book?" They said: "Our rabbis blacken the face of the guilty and expose them to public ridicule." "Abdallah ibn Salam (who had been a Jew) said, 'Messenger of God, tell the Jews to bring the Torah.' They brought it, but a Jew put his hand over the verse which prescribes stoning and began to read what came before it and after it. Ibn Salam said to him 'Raise your hand,' and there was the verse about stoning beneath his hand. The Messenger of God gave the order, and they were stoned.' Ibn 'Umar added: "They were stoned on level ground and I saw the man leaning over the woman to shield her from the stones."

Quoted in J. WILLIAMS, *ISLAM* 82-83 (1961).

Islamic law. *Ijma*, or consensus of the scholars, is of very high and perhaps controlling authority, but there is disagreement among the schools both as to the scope of consensus which is required for *ijma* and the permanence of the rules thus derived. Muslims variously hold that the consensus is needed only among the scholars of a particular school, or legists, or legists of an early era, or the Companions, or scholars in general, or the entire Muslim community. Whether the consensus needs to be unanimous to be valid and whether the unanimity requires the explicit consent of all involved is also debated.<sup>33</sup>

One important view of *ijma* is that once consensus is achieved there can be no more dispute concerning that rule. Thus, by the tenth century A.D., most of the great thinkers of Muslim jurisprudence had agreed upon the fundamental rules of the Shari'a and further legal speculation was no longer permitted. This conception of *ijma* has been a great hindrance to the subsequent development of Islamic law.<sup>34</sup>

Additionally, *ijma* can be used as a separate method for authenticating the Traditions of the Prophet. According to this view, if the legal scholars of a given generation agree on a point, their judgment is regarded as infallible. Thus, the fact that there was general acceptance among the schools of most of the traditions contained in the great compilations signifies that the traditions are authentic.<sup>35</sup> Unfortunately, the authority for this concept of *ijma* itself comes from a tradition. Mohammed reportedly declared, "[m]y community will never agree on an error."<sup>36</sup> The reasoning, of course, is circular. Indeed, if research casts doubt on the validity of the traditions, then this view of *ijma* must necessarily lose its authority as well. In fact, Schacht declares that *ijma* was derived from the Roman law tradition of *opinio prudentium*.<sup>37</sup>

33. See F. ZIADEH, *supra* note 4, at 118; see generally K. FARUKI, ISLAMIC JURISPRUDENCE 68 (1962); D. MULLA & M. HIDADJATULLAH, PRINCIPLES OF MAHOMEDAN LAW xxii (16th ed. 1968); AQL AHMAD, *supra* note 22, at 17; AZIZ AHMAD, *supra* note 20, at 43.

34. H. GIBB, *supra* note 7, at 66. Modern Muslim reformers find *ijma* one of their greatest obstacles. H. GIBB, MODERN TRENDS IN ISLAM 13 (1947) [hereinafter cited as MODERN TRENDS].

35. P. HITT, HISTORY OF THE ARABS 399 (10th ed. 1970); ISLAMIC LAW, *supra* note 2, at 13-14. However, Anderson elsewhere asserts that Western students of Islam regard *ijma* as "fundamental" while Muslims grant primacy to the Qur'an and the Sunna. LAW REFORM, *supra* note 2, at 6 n.7.

36. HISTORY, *supra* note 14, at 77; 2 I. GOLDZIEHER, *supra* note 6, at 88; see LAW REFORM, *supra* note 2, at 6 n.7.

37. INTRODUCTION, *supra* note 5, at 20. There are, of course, supplementary sources of Islamic law recognized by various schools. They include *istihsan*, hallmark of the Hanafi school, wherein the application of equity is used to reach a just solution to problems which

According to classical Islamic law, there was no historical development of the fundamentals of the Shari'a. The "law" was divine in origin, given by God through Mohammed in the Qur'an and the Sunna. The major precepts were known at the death of Mohammed. None were added afterwards. All that Islamic jurisprudence did was to authenticate the already given divine commands, and to deduce from them their logical implications.

Thus, the four Caliphs who succeeded to the leadership of Islam after the death of Mohammed (Abu Bakr, Umar, Uthman, and Ali) applied the Qur'an and their remembrance of the Sunna of the Prophet to legal problems. Following the death of Ali, in 40 A.H., the Muslim world was riven by a civil war. But within a brief period, the Umayyads successfully gained the leadership of the Islamic empire. At this point, the local schools of law began to develop, first in the Prophet's city of Medina (under Malik) and later in Kufa (under Hanifa).

In applying the Qur'an and the Sunna to the new situations before them, the local jurists first used *ra'y* (independent reasoning). *Ra'y*, however, led to diverse and conflicting results and it was quickly supplanted by the technique of *qiyas*. In fact, *ra'y* was disparaged as engendering "innovation" in the divine law. *Qiyas* became the corrective for the subjective *ra'y*.

The schools of law also began the preliminary *hadith* compilations to help remember the Sunna. In a few years, two more schools formed under the disciples of Shafi'i and Hanbal. Despite their remaining differences, all of the schools joined in a movement to reform the worldly Umayyads.

In the end, they succeeded in systematizing Islamic law and purifying the traditions of false components. Their triumph was completed in the middle of the second Islamic century, when the Umayyads were overthrown by the more orthodox Abbasids, and later in the third century when the final compilations of the traditions were written.

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are not adequately covered by the other sources. In fact, *istihsan* allows for deviation from precedential rules. *Istislah*, the famous principle of the Maliki school, allows for new rules to be made in the public interest. Such rules are to be permitted only if the Qur'an or Sunna has not made a definite statement of values applying to the case. *Urf*, or local custom, is allowed in certain areas of territory and in certain legal matters where the Shari'a has left the subject open. *Istidlal* is the use of logical inference when the strict rules of *qiyas* are not sufficient.

## II. SCHACHT'S HISTORIC CRITICISM

Joseph Schacht indicated that most of Islamic law, including its sources, resulted from a process of historical development.<sup>38</sup> Where classical Islamic jurisprudence claims that legal problems were solved by recourse to the Qur'an, the Sunna, *ra'y* (later rejected), *qiyas*, and *ijma* in that order, Schacht asserts that the content of Islamic law followed a different sequence.

In capsule form, Schacht holds that first, during the period of the Caliphate and in the early Umayyad empire, pre-Islamic custom formed the bulk of the legal rules in Arabia. This was the traditional "sunna" that the Arabs had lived under for centuries. At the same time, local custom and the administrative rules of the Umayyads were the law in the newly conquered provinces, creating a second, parallel sunna. The law in Arabia and the provinces was structured and developed by the newly forming schools of law, first through *ra'y*, but mostly by consensus. The doctrines arising from the schools formed a third sunna, called the living tradition of the schools.

Soon thereafter, the schools began restructuring much of the law by reference to the Qur'an. Finally, beginning around 100 A.H., the Traditions of the Prophet began to be fabricated. Eventually, the traditions formed a new and final Sunna, which replaced the pre-Islamic sunna of Arabia, the mixed custom-administrative law sunna of the distant provinces, and the living traditions of the schools. The unification of Islamic legal thought occurred under Shafi'i, who raised the Traditions of the Prophet to a position of pre-eminence, second only to the Qur'an. Thus, the Qur'an (except for a few early rules) and the Traditions of the Prophet were historically the last authoritative ingredients in the formulation of Islamic law, not the first.

Schacht's unsettling conclusion is that the Traditions of the Prophet were a late invention and that few, if any, are authentic. In fact, Schacht terms the development of the *ahadith* as an "innovation,"<sup>39</sup> perhaps the most anathematic word in Islamic legal thought, signifying a purely human rule unconnected to the divine source of law.

Expanding on his position, Schacht asserts that the "sunna" which existed after Mohammed was the same "sunna" of pre-

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38. The following summation of Schacht's position is taken *passim* from his writings, note 5 *supra*.

39. ORIGINS, *supra* note 5, at 30.

Mohammed Arabia, with only a few modifications dictated by the Qur'an. Mohammed himself was not interested in changing much of the traditional sunna. He was primarily concerned with reforming religious practices. As the leader of Medina, Mohammed conducted himself in the manner of the old arbitrators, or *hakams*, of Arabia: judging cases on an *ad hoc* basis.<sup>40</sup> In Mohammed's case, Schacht concedes, the role of the *hakam* was modified. The traditional *hakams* did not formulate black letter law as such, but rather decided questions according to their understanding of custom. The decisions of the Prophet, on the other hand, were to have precedential value.<sup>41</sup> But Mohammed limited his law-giving function primarily to the question of religious duties: "[h]e wielded his almost absolute power not within but without the existing legal system; his authority was not legal but, for the believers religious and, for the lukewarm, political."<sup>42</sup> Since Mohammed's primary mission was religious, he "had little reason to change the existing customary law."<sup>43</sup> It must be presumed that decisions based on the traditional law continued to be made by the ordinary *hakams*.

The Caliphs who succeeded Mohammed as the leaders of Islam did not themselves become arbitrators. Instead, they appointed *hakams* who continued to apply the existing sunna of Arabia, with the exception of a few modifications taken from the Qur'an. The Caliphs became administrative law-givers who devised regulations for governing the newly conquered territories, while leaving the local law of Arabia substantially intact. The division between religious requirements and legal rules remained so explicit that even a number of the Qur'anic legal forms were ignored. For example, flogging, not the Qur'anic requirement of maiming, was the penalty for thievery.<sup>44</sup> Because the secular was separated from the sacred, the Muslims had no qualms in allowing the local custom of the conquered provinces to supplement the administrative regulations as the law for those areas.<sup>45</sup> Where the phrase "sunna of the Prophet" was used in the early years, it either had a theological, not legal, meaning, or

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40. The *hakams* were also soothsayers, and Mohammed went out of his way to insist that he was not just another diviner, but had a greater mission. INTRODUCTION, *supra* note 5, at 10. Nonetheless, when making pronouncements of his revelation, he affected the manner of a *hakam*. M. GAUDEFRY-DEMOMBYNES, MUSLIM INSTITUTIONS 62 (1950); H. GIBB, *supra* note 7, at 24-25.

41. INTRODUCTION, *supra* note 5, at 10.

42. *Id.* at 11.

43. *Id.* Schacht's perception of Mohammed as a religious but not a legal reformer is contested by Coulson. See p. 19 *infra*.

44. INTRODUCTION, *supra* note 5, at 15.

45. *Id.* at 19.

it was designed to ground in the Qur'an the authority of the Caliphs to make binding regulations. It was not a shorthand version of the positive legal rules of the Prophet.<sup>46</sup>

With the end of the Caliphate of the Companions and the beginning of the reign of the Umayyads, the next stage in the development of Islamic law began. In the newly conquered territories, the Umayyad governors appointed *qadis* to administer edicts and decide disputes. The *qadis* were a branch of the executive administration, and consequently, the corpus of the law they administered was founded in Umayyad regulations. Here too the regulations frequently took into account the customary law of the provinces. Consequently, in the provinces the "sunna" was a mix of administrative practice and local custom interpreted through the *ra'y* of the *qadis*.<sup>47</sup>

The *qadis* soon became specialists in law. They joined with other scholarly and religious Muslims in regional centers throughout the empire to begin the development of the schools of law. In the early years of the second Islamic century, the primary schools were centered in Kufa and Basra in Iraq, Medina and Mecca in Hijaz, and in Syria. Kufa and Medina became the most important, particularly Kufa. Traditional Islamic history holds that Medina was the first and most important school, because there the memory and traditions of the Prophet were necessarily the strongest. Schacht's researches indicate that Kufa was in fact more important, and that many of the legal precepts of Islam developed there and only later spread to Medina.<sup>48</sup>

Kufa was a cosmopolitan center, swept by many intellectual crosscurrents. As a result, many legal rules and procedures from other systems were absorbed. It was there that the Roman law principle of "the consensus of the scholars" was transformed into *ijma*.<sup>49</sup> Replacing *ra'y*, the consensus of the scholars became the basis upon which the schools interpreted and reformed Umayyad administrative practice and local custom. The doctrinal development of the schools grew. Replacing pre-Arabian custom and Umayyad regulations, the doctrines took on the form of a new, third "sunna," which was called "the living tradition of the school."<sup>50</sup> Communications

46. *Id.* at 17-18.

47. *Id.* at 24-26.

48. ORIGINS, *supra* note 5, at 228; INTRODUCTION, *supra* note 5, at 29.

49. ORIGINS, *supra* note 5, at 83; Schacht, *The Law*, in UNITY AND VARIETY IN MUSLIM CIVILIZATION 71 (G. von Grunebaum ed. 1955) [hereinafter cited as *The Law*]. *Qiyas* was borrowed from the rabbinic *heggesh*, itself taken from Greek influences. *Foreign Elements*, *supra* note 5, at 14.

50. INTRODUCTION, *supra* note 5, at 29-30.

within the Islamic empire were exceedingly efficient, and methods and doctrines quickly passed from school to school.

During this same period a strong religious movement arose which opposed the secular excesses of the Umayyads. The reformers sought to impregnate the empire with Qur'anic norms. The schools were sometimes within this movement and sometimes without. But because of the influence of the religious reformers, the schools began to apply Qur'anic injunctions to legal problems more rigorously, and thus the process of the legal Islamicization of the empire began.<sup>51</sup>

The critical juncture in the development of Islamic law occurred around 120 A.H. "By a literary convention, which found particular favor in Iraq, it was customary for an author or scholar to put his own doctrine or work under the aegis of an ancient authority."<sup>52</sup> Thus, the Kufans, followed in a few years by the Medinese, falsely ascribed their new doctrines back to earlier jurists within their respective schools. Soon, the process was extended further backwards in time to include the alleged doctrines of the Companions. But once authority was sought by invocation of the names of the Companions, it was inevitable that the temptation to ascribe a view to the Prophet himself would become irresistible. The schools in Iraq were the first to take the theological concept of the "sunna of the Prophet" and apply it in a legal context.<sup>53</sup>

The religious reformers, however, were the real champions of the practice, supporting their views by reference to "examples" of Mohammed. Their reliance on this technique earned them the name of the "traditionists," and they used their method to oppose distasteful legal doctrines of the various schools. Detesting both *ra'y* and *ijma*, the traditionists wanted all legal rules to be derived from the divine Qur'an and practices of the Prophet. In their religious fervor, they did not shirk from fabricating traditions to aid their religious reform of the secular law. The traditionists even developed self-justificatory sayings of the Prophet such as, "[s]ayings attributed to me which agree with the Qur'an go back to me, whether I actually said them or not."<sup>54</sup> At first, the schools resisted the tactic. Ultimately, however, they wound up copying the traditionists. Men of faith themselves, the jurists defended themselves by circulating traditions which supported their own viewpoints. Yet by doing this,

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51. *Id.* at 26-27, 29; ORIGINS, *supra* note 5, at 191, 283.

52. *Pre-Islamic Background*, *supra* note 5, at 43.

53. *Id.* at 33.

54. *Id.* at 46.

they recognized the final legitimacy of the Traditions of the Prophet.<sup>55</sup>

By the end of the Umayyad dynasty in 140 A.H., the process of Islamicization of the law was virtually completed.<sup>56</sup> All that was lacking was a systematizing of the result. Two schools (Kufa and Medina) soon took on the names of their most famous jurists (Hanifa and Malik), while the other regional schools fell from sight. In the last half of the second Islamic century, Shafi'i appeared. It was he who accomplished the great systematizing of Islamic law through an emphasis on the final authority of the traditions. Even the Qur'an had "to be interpreted in the light of traditions, and not vice versa."<sup>57</sup> Shafi'i's theory so changed what had been the juristic values in the "living tradition of the schools" that Schacht terms it a "ruthless innovation."<sup>58</sup> The other schools accepted his scheme, though they continued to differ on which *ahadith* were acceptable, how they were to be interpreted, and what other sources were also acceptable. His disciple, Hanbal, formed a fourth school, which was even more insistent that the Sunna of the Prophet was determinative of proper legal rules.

After Shafi'i and Hanbal, the substance of most of Islamic law was settled. The first three centuries of Islam had witnessed a dynamic development of the law. Pre-Islamic custom, Umayyad regulations, Qur'anic injunctions, foreign influences, scholarly interpretations and created traditions crashed against one another in a creative turmoil. Most scholars of that period were regarded as *mujtahids*, persons capable of exercising *ijtihad*, that is, utilizing reason to develop legal rules in light of the basic sources. But after Shafi'i's time, the "gate to *ijtihad*" became closed. All the authoritative rules had been formulated. *Ijma* assured their authentication. Although four schools survived the formulative period of Islamic law and although their interpretations of the law have differences, each regards the others as equally orthodox.

After about 1000 A.D., attempts to develop the law beyond what the schools had done were regarded as tantamount to heresy. In the stead of *ijtihad* came the doctrine of *taqlid*, which required the faithful to obey without question the commands of pious men. New legal thinking was abhorred.<sup>59</sup> A resultant lack of dynamism

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55. INTRODUCTION, *supra* note 5, at 35-36.

56. *Id.* at 55; *Pre-Islamic Background*, *supra* note 5, at 53.

57. INTRODUCTION, *supra* note 5, at 47

58. *Id.* at 48.

59. *Id.* at 69-70.

permeated Islamic law and has continued to the present century. There have been a few legal scholars of the first order who disregarded *taqlid* in their attempt to contribute to Islamic *fiqh* (the science of jurisprudence), but in every case, they did so in the face of great opposition.

Schacht uses a number of criteria to prove that most traditions were created after 100 A.H. as devices to substantiate particular points of view. First, all authentic early writings of Islamic law are virtually devoid of any mention of traditions. Some early writers even held that "every opinion not based on the Koran, is erroneous."<sup>60</sup> Second, the early doctrines of the schools of law were almost always traced (usually apocryphally) to an earlier jurist or to the Companions, virtually never to the Prophet.<sup>61</sup>

Most important, as Schacht declares, "[t]he best way of proving that a tradition did not exist at a certain time is to show that it is not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed."<sup>62</sup> The obvious objection to this criterion is that the discussants may not have known of a particular tradition. But this objection has only limited weight for three reasons. First, communications in the empire were so good that doctrines and views spread easily and quickly from one juristic center to another. Second, if indeed the society was so attuned to seeking the Sunna of the Prophet, it is unlikely that so many traditions would have been lost or forgotten. Third, even if an occasional tradition escaped the ken of a certain judge, nonetheless Schacht's evidence remains overwhelming. There are simply hundreds of examples in which the disparity between an early decision and a later tradition took place. The jurists who decided the cases were among the most learned and pious men of Islam. It goes beyond rational belief to think that these men would have been so consistently ignorant of contrary actions by the Prophet.<sup>63</sup>

Ironically, under Schacht's analysis, those *ahadith* which are the most secure under Muslim science are often the most suspect. If a tradition had many parallel *isnads*, and was transmitted by well-known and revered men, and it was *still* not followed in early cases, then the conclusion that it was created at a later date becomes difficult to gainsay.

60. ORIGINS, *supra* note 5, at 141.

61. INTRODUCTION, *supra* note 5, at 32; ORIGINS, *supra* note 5, at 21, 29.

62. ORIGINS, *supra* note 5, at 140.

63. For Noel Coulson's answer to this point of view, see pp. 19-20, *infra*.

### III. THE DEBATE OVER SCHACHT

Joseph Schacht's discoveries have engendered one of the most vigorous debates about Islamic law in centuries. In general, Muslim scholars are somewhat in disarray and uncertain of how to handle Schacht's conclusions. Western scholars, on the other hand, have been more amenable to absorbing Schacht's view into their own studies in the field. But both groups contain critics as well as supporters. In fact, it is in the Western group of orientalists where the stiffest challenge to Schacht is raised.

#### A. *The Reaction of Western Scholars*

Nearly all Western Islamic scholars agree that Schacht's evidence against the authenticity of the traditions is virtually unassailable.<sup>64</sup> They believe he has confirmed the original hypothesis of Goldziher. Maurice Gaudefroy-Demombynes is particularly frank. Many of the traditions, he said, "are apocryphal and were invented in the 8th century in order to justify innovations and tendencies which were very foreign to the intentions of the Prophet."<sup>65</sup> He admits that the mass of *ahadith* did more to expand Islamic law than restrict it. The traditions were a better source than even the Qur'an because they "could even be created out of nothing."<sup>66</sup> The Sunna and the commentaries constitute "a mass of material to make capital out of, rather than an epitome of principles and rules of conduct."<sup>67</sup>

Herbert Liebesny finds that Schacht's revelations complement Liebesny's own researches into the influence of non-Islamic legal forms on the practice of Islamic law.<sup>68</sup> J. N. D. Anderson similarly holds that most of the traditions were, "beyond question, fabricated,"<sup>69</sup> and that Schacht has shown that the classical rendition of Islamic law "is both idealized and oversimplified."<sup>70</sup> Anderson's

64. See, e.g., A. GUILLAUME, *ISLAM* 98-100 (2d rev. ed. 1956).

Philip Hitti is one Western scholar who accepts the classical theory of Islamic law even though he notes Schacht in his bibliography. P. HITTI, *ISLAM*, *supra* note 26, at 186 (1970).

65. M. GAUDEFROY-DEMOMBYNES, *supra* note 40, at 65.

66. *Id.* at 61.

67. *Id.* at 66.

68. In his edited volume, *THE LAW OF THE NEAR AND MIDDLE EAST* 24 (1970), Liebesny entitles the section in which Anderson summarized Schacht's findings as "The Actual Historical Development." On his use of Schacht's contributions see, e.g., Liebesny, *Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions*, 20 *AM. J. COMP. L.* 38, 41-43, 48 (1972).

69. *ISLAMIC LAW*, *supra* note 2, at 12.

70. *LAW REFORM*, *supra* note 2, at 8.

main concern is with the modern development of Islamic law. Consequently, he finds it "immaterial for our present purpose that modern scholarship has thrown the gravest doubt on the authenticity of the whole corpus of traditions as they have come down to us."<sup>71</sup> He is more concerned with the reformist movements in present-day Islam. Yet it is Schacht's revelations which may hold the key to the future development of Islamic law.

Seymour Vesey-Fitzgerald also agrees that "there was deliberate forgery of traditions by responsible lawyers on such a scale that no purely legal tradition of the Prophet himself can be regarded as above suspicion."<sup>72</sup> He attests that "[t]he new evidence revealed by Schacht's researches raises the strong suspicions of previous scholars to the level of proof."<sup>73</sup> But Vesey-Fitzgerald hints that the substance of the rules behind the false stories may have reflected the views of Mohammed. However, even here, he suggests that Mohammed did not intend any rigid formula. The traditions attempted to create "legal theory out of what can hardly have been more than administrative advice."<sup>74</sup>

Vesey-Fitzgerald also tries to explain how the Muslim *hadith*-critics could have been so wrong. Simply because a man would not willingly lie does not necessarily mean that he is telling the truth, he suggests. Time, distance, memory, and disputative pressures can drastically distort a person's testimony.<sup>75</sup> This is an interesting psychological point, but it cannot explain how those "responsible lawyers" could have created such "deliberate" lies, as Vesey-Fitzgerald says they did.

H. A. R. Gibb, having written and researched for so long, found it difficult to deny Schacht, yet also found it hard to fit him into the traditional scheme. Gibb's analysis parallels the suggestions of Goldziher more than it incorporates Schacht.<sup>76</sup> When Gibb reviewed Schacht's *The Origins of Muhammadan Jurisprudence* in 1951, he first credited Goldziher with laying "the axe to the root of the accepted doctrine of the origin of Muslim *hadith* or Tradition."<sup>77</sup> In

71. Anderson & Coulson, *The Moslem Ruler and Contractual Obligations*, 33 N.Y.U.L. Rev. 917, 925 (1958).

72. Vesey-Fitzgerald, *Nature and Sources of the Shari'a*, in 1 LAW IN THE MIDDLE EAST 85-94 (M. Khadduri and H. Liebesny eds. 1955).

73. *Id.*

74. *Id.* at 93.

75. *Id.* at 93-94.

76. Compare H. GIBB, *supra* note 7, at 57-59 with 2 I. GOLDZIHHER, *supra* note 6, at 89-144.

77. Gibb, *Book Review*, 33 J. COMP. LEGIS. AND INT'L L., 3d ser., Parts III and IV, 113 (1951).

the review, Gibb seemed to acknowledge the accuracy of Schacht's findings. He wrote that the book "will become the foundation of all future study of Islamic civilization and law, at least in the West," and that Schacht's "main structure is not likely to be impugned on any but *a priori* grounds."<sup>78</sup>

Nonetheless, Gibb's later revised writings show a continued hesitancy to embrace the full implications of Schacht's thesis. He accepts, apparently on *a priori* grounds, at least part of the classical Islamic view that a detailed concern for what the Prophet did permeated the first century of Islam, particularly among the Muslims of Medina.<sup>79</sup> He flatly contradicts Schacht's theory that Mohammed confined his authority primarily to the religious side of life.

[Law] was the practical aspect of the religious and social doctrine preached by Mohammed. For the early Muslims there was little or no distinction between 'legal' and 'religious.' In the Koran the two aspects are found side by side, or rather interwoven one with the other, and so likewise in the Hadith.<sup>80</sup>

Using gentler language than Schacht, Gibb concedes that as Islam developed under new philosophical and social pressures, "the figure of the Prophet was continually readjusted to the new ideas and ideals."<sup>81</sup> Further, Gibb acknowledges the artificiality of the *isnad* process as a means of authenticating the traditions. Yet he declines to reach the same conclusion as Schacht did: "some European critics have argued for a more or less radical rejection of the whole system as an artificial creation of later Muslim scholasticism. But this is to go too far."<sup>82</sup> Gibb suggests instead that Arab cultural tradition has imprisoned the debate over the substance of religious

78. *Id.* at 114.

79. H. GIBB, *supra* note 7, at 50.

80. *Id.* at 61.

81. *Id.* at 23.

82. *Id.* at 56.

W. Montgomery Watt echoed Gibb's assessment when he wrote, "[i]n its broad outlines, the theory of Schacht appears to be justified, though in places he may have worked it out too radically." W. WATT, *THE FORMATIVE PERIOD OF ISLAMIC THOUGHT* 66 (1973). Watt accepts Schacht's view that the living tradition of the ancient schools was a form of sunna reflecting the "idealized practice" of the early Muslims. Further, he admits that the doctrines of the ancient schools were opposed by the party of Tradition which created *isnads* reaching back to the Prophet. *Id.* at 256-57. Yet Watt believes that early Muslims "were aware of the spirit in which Muhammed in his decisions had tried to fuse together Arab custom and Qur'anic principle." *Id.* at 65. Furthermore, although there was no early systematic transmission of the Traditions of the Prophet, Watt insists that "[a]necdotes were certainly passed on." *Id.* at 68. For a more complete exposition of a similar viewpoint, see the criticisms of Schacht by Coulson at p. 19 *infra*.

beliefs into the device of the *hadith*. Although the *hadith* scholars were later able to weed out thousands of fabricated traditions by means of testing the *isnad*, they always realized that it was a screen for the substance of what lay beneath.<sup>83</sup> Consequently, Gibb looks upon the *ahadith* not as a fiction, but as a means to reflect in a "documentary" fashion the realities of Islamic belief.<sup>84</sup>

By this method of analysis, Gibb hopes to rescue the bulk of the Shari'a from being construed as a total juristic contrivance. Yet he does not deny what Schacht has demonstrated, *viz.*, that the Traditions of the Prophet cannot be a valid documentary source for what the Prophet actually did.<sup>85</sup> And for the orthodox Muslim, only the authenticated actions of the Prophet can be a basis for the Sunna.

Noel Coulson has expanded on the suggestions of Vesey-Fitzgerald and Gibb by directly confronting Schacht's conclusions. In doing so, he triggered a reaction by Schacht, who likely had been irked by the hesitant and largely undocumented criticism of his theory by Western scholars. Since Coulson's view represents the most developed challenge to Schacht, it is useful to consider it in detail.

To begin with, Coulson admits from the outset that "the thesis of Joseph Schacht is irrefutable in its broad essentials and that the vast majority of the legal dicta attributed to the Prophet are apocryphal and the result of the process of 'back-projection' of legal doctrine . . . ."<sup>86</sup> At the same time, Coulson suggests that the admittedly fabricated traditions may have represented in substance the rules of law the Prophet actually promulgated while at Medina.<sup>87</sup>

Where the legal rule enunciated clearly represents an advanced stage in the development of the doctrine, or where it concerns problems which cannot have faced Muslim society until well after the death of the Prophet, the presumption of falsehood is overwhelming. But where . . . the rule fits naturally into the circum-

83. H. GIBB, *supra* note 7, at 56-57.

84. *Id.* at 58-59.

85. However, some of Gibb's language indicates a lingering belief that even the false traditions reflected to some degree Mohammed's actual teachings. In his assertion that the *ahadith* have documentary value, he says:

[t]he study of the hadith is *not confined* to determining how far it represents the authentic teaching and practice of Mohammed and the primitive Medinian community. It serves *also* as a mirror in which the growth and development of Islam as a way of life and of the larger Islamic community are most truly reflected. [Emphasis added.]

*Id.* at 58.

86. HISTORY, *supra* note 14, at 64.

87. *Id.* at 64-65.

stances of the Prophet's community at Medina, then it should be tentatively accepted as authentic . . . .<sup>88</sup>

Generally speaking, the traditions are only a fictionalized illustration of the underlying reality of what occurred at Medina. Coulson advances a number of propositions to show how something proven to be false when written down in the second century A.H. could nevertheless be a true reflection of events that took place well over one hundred years before.

Between the time of the death of Mohammed and the rise of the schools, some legal rules had to be applied, Coulson argues. Otherwise, "a void is assumed, or rather created, in the picture of the development of law in early Muslim society."<sup>89</sup> The Qur'an was not a dead letter. Mohammed and his successors must have had to contend with the new legal as well as religious problems the Qur'an posed to traditional Medinan society.

Schacht's "void," however, was not without legal content. He concedes that the Qur'an was applied to areas of inheritance and marriage, but that other areas of the law were adequately covered by the pre-Arabian sunna, or later, by Umayyad practice and the doctrines of the ancient schools. The society was also open to legal forms taken from the conquered peoples. Only later did a general Islamicization of the law take place by means of a broader application of the Qur'an.<sup>90</sup>

In his analysis of the Sunna of the Prophet, Coulson suggests alternative theories to Schacht's.<sup>91</sup> First, Coulson repeats the obvious objections that early judges may have been ignorant of a number of *ahadith*. But this, of course, cannot answer the hundreds of discrepancies that Schacht builds up. Second, Coulson says that an early judge may have known of a particular *hadith*, but might have failed to draw the same conclusions from it that later judges did. This hypothesis is more plausible, but again, it is hard to measure it against the numerous *direct* contradictions that Schacht lists between early practice and a later *hadith* on a similar set of facts.

It is unclear why Coulson raised these arguments. They are easily countered by reference to Schacht's works. Nor are they logically necessary to Coulson's main point, *viz.*, that even if a judge

88. *Id.* at 70.

89. *Id.* at 65. The "void" refers to questions "which were begged by the Qur'an itself and cannot possibly have been ignored by the early rulers and authorities." Letter from Prof. Noel Coulson to the author (June 21, 1978).

90. ORIGINS, *supra* note 5, at 224.

91. HISTORY, *supra* note 14, at 67.

knew of a particular *hadith*, and had correctly interpreted it, "he would not necessarily consider himself bound by it; for he lived at a time when . . . the authority of the Prophet as the interpreter of the Qur'an was by no means considered paramount or exclusive."<sup>92</sup> Coulson asserts that a practice of the Prophet could have been known and could have existed side-by-side with contrary rules for over a century. It was only later when the actions of the Prophet were regarded as divinely inspired and binding, that these rules supplanted pre-existing contrary regulations. The fact that in their writing, the *ahadith* were embellished with false biographical data does not necessarily devoid them of their substantive authenticity. The traditions were fabricated to illustrate what was already known but not yet accepted to be the precedential rules of the Prophet.

Coulson has focused on a gap in Schacht's logic. The mere fact that a tradition is apocryphal does not mean that the underlying legal rule attributed to the Prophet is fictitious as well. This leaves two choices: either presume that a rule underlying the fabricated tradition is also false, unless alternative authenticating evidence is offered; or presume that the fabricated tradition reflects a genuine view of the Prophet, unless contradicted by other evidence. In opting for the latter, Coulson challenged a major implication of Schacht's argument.

Schacht took up the challenge in a review of Coulson's book, to which Coulson issued a reply.<sup>93</sup> In the review, Schacht's style is comparable to a professor correcting a term paper. Page by page, he lists passages in Coulson's book in need of correction.<sup>94</sup> He also makes an oblique *ad hominem* evaluation when he writes, "Mr. Coulson looks at Islamic law with the eyes not of a student of Islam but of a modern lawyer,"<sup>95</sup> to which Coulson replies that "it is plain that Schacht does not write, or think, as a lawyer."<sup>96</sup>

Schacht's pedantry stemmed from a fear that the great studies in Islamic scholarship of the past few decades would be unthinkingly cast aside. Justifiably, Schacht believed that Goldziher was unfairly ignored by Islamic scholars for decades, and he was distressed that the implications of his own researches "have not always

92. *Id.* at 68.

93. *Modernism and Traditionalism*, *supra* note 5; Coulson, *Correspondence*, 3 MIDDLE EAST STUD. 195 (1967) [hereafter cited as *Correspondence*].

94. *Modernism and Traditionalism*, *supra* note 5, at 396-400.

95. *Id.* at 390.

96. *Correspondence*, *supra* note 93, at 201. Coulson has also sharply contested much of Schacht's theory regarding the Shi'ite sect. N. COULSON, SUCCESSION IN THE MUSLIM FAMILY 125, 127 (1971).

been faced resolutely . . . ."<sup>97</sup> He suggests that Coulson is trying "to whittle . . . away" the results of Schacht's method, and he terms Coulson's contrary propositions "fanciful."<sup>98</sup>

In the review, Schacht calls "unthinkable" Coulson's proposition that Mohammed's specific legal rulings would not be considered binding by his successors.<sup>99</sup> In reply, Coulson cites an example of a tradition of the mid-second century A.H. which was "well attested" but which Malik and Abu Hanifa rejected. Coulson implies that the two scholars rejected the tradition not because they believed it invalid but because they did not regard it as binding.<sup>100</sup>

The crux of the debate between the two men centered around a particular tradition attributed to the Prophet restricting bequests to one-third.<sup>101</sup> The tradition states that a man on his death bed set six of his slaves free, but that a Umayyad governor voided the decision and freed only two slaves, chosen by lots. Schacht holds that death-bed manumission is a bequest in Islamic law, and that this decision had all the earmarks of an "innovation." The Umayyad ruling therefore is the source of the general Shari'a rule limiting bequests to one-third of a deceased's estate.<sup>102</sup> Later, the six slaves tradition was spuriously ascribed back to the Prophet. Some further time afterwards a new tradition appeared (the tradition of Waqqas),<sup>103</sup> wherein the Prophet himself required a dying friend to limit his bequests to one-third. Coulson asserts that the Waqqas tradition accurately reflects the original ruling of Mohammed and that the decision of the Umayyad governor merely extended the ruling to gifts made in contemplation of death. For Coulson, the Umayyad action was not the source of the rule, but only an application.<sup>104</sup> Schacht brands this kind of analysis as "indeed projecting doctrines backward with a vengeance, and Mr. Coulson shows himself more credulous than the traditionists of the third century of the hijra who at least rejected traditions with *isnads* which *they* considered spurious."<sup>105</sup>

The two scholars bolster their separate arguments by collateral evidence. Schacht notes that the limitation of bequests to one-third

97. *Modernism and Traditionalism*, *supra* note 5, at 389.

98. *Id.*

99. *Id.* at 395.

100. *Correspondence*, *supra* note 93, at 197.

101. *ORIGINS*, *supra* note 5, at 201-02.

102. *Id.* at 201.

103. This tradition is quoted at note 32, *supra*.

104. *Correspondence*, *supra* note 93, at 198.

105. *Modernism and Traditionalism*, *supra* note 5, at 392.

benefitted the fiscal policies of the Umayyad administration<sup>106</sup> and is only one more instance of the habit of the Umayyads to set one-third as an arbitrary limit for payments in many other contexts.<sup>107</sup> Coulson counters that the state would only benefit from this rule if there were not enough heirs to exhaust the estate (an unlikely occurrence in an extended tribal structure). In addition he states that the one-third rule in other Umayyad regulations applied to areas of tax and public law, and not to subjects of private law.<sup>108</sup> Schacht further argues that the context of Umayyad regulations makes the origin of the one-third rule plausible, whereas if the one-third rule was part of Medinan society (of which almost nothing is known) then it should be expected to be in the Qur'an, which treats legacies in great detail.<sup>109</sup> But Coulson disagrees again. He claims that the Qur'an is not particularly encyclopedic on the rules of succession and consequently this would be precisely the kind of problem the Prophet would have been called upon to solve.<sup>110</sup>

Schacht puts forward one last defense which Coulson chooses not to counter. The Waqqas tradition is paralleled almost exactly by an earlier tradition attributed to Umar, in which nearly word for word, Umar finally allows a bequest of one-tenth. For Schacht, if the traditionists casually changed the provenance of the story from Umar to Mohammed, it seems an irresistible conclusion that they likewise fabricated the new fraction to justify what had become standard practice under the Umayyads and the schools.<sup>111</sup>

After Coulson's reply was published, Schacht did not continue the debate. Regrettably, he died two years later, leaving the debate unresolved. Despite the highly developed arguments from both Schacht and Coulson, the result is the same: it simply is not known if traditions ascribed to the Prophet fairly reflect his legal views. The *isnads* are totally unreliable. Corroborative evidence is sketchy. It must be decided on the basis of logical inference whether the rules underlying the *ahadith* merit a presumption of validity despite the dissimulation inherent in the vehicle.

The debate with Schacht helped Coulson flesh out his objections. He refused to accept the natural inference that if the story was false, the rule underlying the story was also false. But there are

106. INTRODUCTION, *supra* note 5, at 24.

107. *Modernism and Traditionalism*, *supra* note 5, at 394.

108. *Correspondence*, *supra* note 93, at 199.

109. *Modernism and Traditionalism*, *supra* note 5, at 393.

110. *Correspondence*, *supra* note 93, at 199-200.

111. *Modernism and Traditionalism*, *supra* note 5, at 395.

deeper implications to Coulson's alternative. His presumption of validity encounters numerous problems.

First, there remains the vexing issue of the motives of the traditionists. Their consuming objective was to make sacred the secular law of the empire. The struggle permeated the entire Islamic world politically, legally and theologically. For the traditionist, the only acceptable goal was to win the battle against the ancient schools and against the practices of the Umayyads. Their point of departure was adversarial; fabricating traditions was their weapon. It cannot be said that they were simply articulating the remembered examples of the Prophet for the edification of all who might listen. The traditionists' very abhorrence of the empire of the Umayyads likely would have influenced them to construct doctrines as well as tales of the Prophet. The invalidity of the *ahadith* was unmasked in the very attempt to combat the "false" traditions.

The simplest means by which honest men sought to combat the rapid increase of faked *hadiths* is at the same time a most remarkable phenomenon in the history of literature. With pious intention fabrications were combatted with new fabrications, with new *hadiths* which were smuggled in and in which the invention of illegitimate *hadiths* were condemned by strong words uttered by the Prophet.<sup>112</sup>

Whatever the need, the pious produced a *hadith* to satisfy it. If the traditionists did not shirk from creating stories and *isnads* to justify nearly all their opinions, then we can be justifiably suspicious of the claim that the substance of their arguments reflect the views of the Prophet, at least until some additional evidence is brought forward.<sup>113</sup> Furthermore, when the traditionists came on the scene, the concept of authority in the law was already juristic, as represented by the ancient schools. In disputing some of the rules of the schools, the traditionists had to find a superior juristic "authority" to

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112. 2 I. GOLDZIEHER, *supra* note 6, at 126-27.

113. As the 12th century Islamic historian Ibn Khaldun put it:

Since it is of the nature of tradition to incorporate false statements we must examine the causes which produce them. They are:

(a) attachment to certain opinions and schools of thought. Now if a man's mind is impartial in receiving tradition he examines it with all due care so that he can distinguish between the true and the false; but if he is pervaded by attachment to any particular opinion or sect he immediately accepts any tradition which supports it; and this tendency and attachment cloud his judgment so that he is unable to criticize and scrutinize what he hears, and straightway accepts what is false and hands it on to others . . . .

Quoted in A. GUILLAUME, *supra* note 64, at 20-21.

counter the authorities the schools had falsely ascribed as the sources of their doctrine. Considering the context of the legal debate, it is far more likely that the traditionists placed the Prophet as the author of their own rules in order to beat the ancient schools at their own game, and not because they had a genuine memory of what he had actually done. Perhaps it was only a slip of the pen, but Coulson himself conceded to Schacht the "back-projection of legal doctrine," not the back-projection of biographical data.<sup>114</sup>

Second, Coulson suggests that if the substance of a tradition could have fit in with Medinan practice at the time of the Prophet, it should be accepted unless contrary proof is offered. The fact remains, however, that most of the legal rules the traditions were designed to replace, as well as those they wished to affirm, could also have fit in with Medinan practice. Standing alone, speculated harmony with the practice of the Prophet's community does not distinguish the traditions from alternative rules extant at the time the traditions were created, or even between traditions circulated to counter one another. The mere fact that the Prophet's name was appended to one practice adds no weight. Of course, if the traditionists' rules had replaced rules proven to be forged by the schools or by the Umayyads, then the contrast would make some sense. But such a differentiation is difficult to make in most instances. A limitation of bequests to one-tenth can be as much in harmony with Medinan practice as would the rule of one-third. During the vogue of back-projecting rules to the Prophet, those in favor of the one-third rule (no matter where it originally came from) expanded one tradition and distorted another to make the Prophet the author of the rule. If adding the Prophet's name to a rule creates no validity, and if the underlying practice and its disputed alternative both can be harmonized with Medinan practice, then there is no logical basis for Coulson's presumption of validity. Otherwise, we are left in the untenable position of saying that whatever group was clever enough first to append the Prophet's name to a tradition supporting their point of view should be granted the presumption of validity.

Third, if the traditionists were falsifying stories about the Prophet in their battle with the schools and the Umayyads, on what basis may we presume that they nonetheless had an accurate view of what the Prophet actually established as a legal rule? The true rule of the Prophet and the "remembered" rule may have been different. Both may comport with Medinan practice. This is a criti-

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114. HISTORY, *supra* note 14, at 64.

cal link in Coulson's theory. Coulson suggests that the actions of the Prophet were known and transmitted orally.<sup>115</sup> This conjecture is plausible considering the oral tradition which was part of Arab tribal culture. However, even if we accept this assumption, there is the question of what the Arabs may have chosen to transmit orally. If Mohammed decided cases as a *hakam* on the basis of existing sunna as modified by the Qur'an, there would have been little reason to remember and transmit his "rulings" for, as Coulson insists, Mohammed's rulings were not regarded as precedentially binding either by his contemporaries or by his successors for well over a century. Granted that the remembrance of the actions of the great Prophet might have been important to the Arabs, it is far more likely that his actions would have been remembered with more accuracy than his legal rulings: the tale more than the legal formula. But Coulson says the traditions represent precisely the opposite: a falsification of the data to illustrate the remembered legal rule.

Finally, there are enormous implications for Islamic law in Coulson's formulation. One might suspect that, outside of its intrinsic merit, Coulson may have put forward his exception to Schacht as an attempt to save the corpus of Islamic law from being drastically undermined. But the sensibilities of devout Muslims are not likely to be assuaged by Coulson's viewpoint. First, he suggests that the acceptance of the Prophet's actions as indirect divine revelation did not occur until sometime in the second Islamic century. In effect, he has called this fundamental aspect of Muslim theology a latter-day innovation. Second, his solution may be even more disorienting to the Muslim who is seeking a solid basis for the sources of the Shari'a. If we know that the *isnad* criteria for authenticating traditions are invalid, what are we to do with the thousands of rejected traditions, uncounted numbers of which contradict the accepted traditions? As Goldziher wrote, "[e]very stream and counter stream of thought in Islam has found its expression in the form of a *hadith*, and there is no difference in this respect between the various contrasting opinions in whatever field."<sup>116</sup> Likely as many, if not more, rejected traditions could have meshed with Medinan social practice just as much as the accepted traditions.

If Coulson is to presume the accuracy of the accepted traditions, he must also grant an equal presumption to the far greater number of rejected traditions. Since the *isnads* provide no basis for

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115. *Id.* at 65.

116. 2 I. GOLDZIHHER, *supra* note 6, at 126.

distinguishing between contradictory traditions, and since contradictory traditions can plausibly fit in just as well with Medinan practice, the conclusion is forced that, at its present stage of articulation, Coulson's solution provides no basis for granting a presumption of validity to the accepted traditions and not to the others. The formula lacks trenchency.

### B. *The Reaction of Muslim Scholars*

Since Schacht's publications, a great many tracts of Islamic law have been published in the Muslim world. Generally, Muslim scholars have been unable to absorb Schacht's findings. Their perception of law remains juristic, not historical.<sup>117</sup>

A survey of the literature reveals that there have been varied reactions to Schacht's discoveries. Some Muslim legal scholars simply ignore Schacht or wish him away. They place him in the same limbo which Goldziher was in for so long. These writers do not face the implications of Schacht's theories, even though they may cite Schacht on another subject, or include him in their bibliographies.<sup>118</sup>

Others treat Schacht as some kind of poacher on restricted ground. For example, Said Ramadan writes that anyone who has not spent his life as a specialized *hadith*-critic (*i. e.*, no Westerner) can ever make a valid criticism of the traditions. Ramadan claims that only "profound study" of the traditions can lead to understanding, and not Schacht's "calculations of probability."<sup>119</sup> The fact is, however, that the entire Muslim science of *hadith*-criticism is based on calculations of probability. In its terms, a tradition is *more likely* to be authentic if its transmitters are pious men, if there are many Companions in the chain, if there are parallel chains, and so on. Traditions are even ranked according to probability of authenticity.<sup>120</sup>

A number of other writers seemingly accept Schacht, but at the same time refuse to alter the classical theory. Anwar Ahmad Qadi, for example, reiterates Schacht's interpretations but still asserts

117. ISLAMIC LAW, *supra* note 2, at 6-7.

118. See, e.g., M. QURESHI, *supra* note 22, at 9, 24, 48; S. ABDEL-WAHAB, AN INTRODUCTION TO ISLAMIC JURISPRUDENCE 59 n.10 (1963). See also Kemal Faruki's support of the efforts of modern historical scholarship to investigate the validity of the *ahadith*, while still ignoring Schacht. K. FARUKI, ISLAMIC JURISPRUDENCE 58 (1962). Cf. M. QURESHI, *supra* note 22, at 22, 55.

119. S. RAMADAN, *supra* note 15, at 40. Ramadan also brands Schacht and other Westerners as "confused" for not realizing that the Sunna was written down in a later period to combat schism. *Id.* at 35.

120. See note 30, *supra*.

that the traditions are valid and go back to the Prophet.<sup>121</sup> He writes that the *hadith* "is the best, most useful reliable source of our knowledge of the Sunna."<sup>122</sup>

On the other hand, some Muslims have sought to contest Schacht directly. Ahmad Hasan, in his major work on the subject,<sup>123</sup> declares: "[t]he view that the law of Islam is purely based on the popular practices of the Ummayyads, and does not take its thread from the Qur'an and the Sunnah of the Prophet is contrary to facts and untenable."<sup>124</sup>

Although Hasan claims to modify traditional Islamic theory where the facts require it,<sup>125</sup> his work is essentially an apologetic for the classical view against encroachments of Western research. He cannot abide, for example, Coulson's suggestions that Mohammed's actions were not binding on the early Muslims.<sup>126</sup>

Hasan's version posits that the Qur'an, the practice of the Prophet, and the traditions, simultaneously and more or less harmoniously, established Islamic legal norms in the earliest years following the death of the Prophet (although admittedly its systematization did not take place until much later). There was no pre-Islamic legal sunna operating unaffected by the Qur'an, the practice, or the traditions. There were few early *hadith*, Hasan explains, because the Companions preferred to follow their own memories of what the Prophet had done. Sometimes, however, one of the Companions would seek out a *hadith* before acting.<sup>127</sup> Thus the practice of the early Muslim community became central: it reflected the spirit of Mohammed's reforms.<sup>128</sup>

121. A. QADRI, *ISLAMIC JURISPRUDENCE IN THE MODERN WORLD* 34-35, 63 (1963).

122. *Id.* at 64.

In the revised version of his famous work on Islamic jurisprudence, Sobhi Mahmassani cites Schacht's *Origins*, but he does not change one part of the classical theory. S. MAHMASSANI, *supra* note 10, at 214. In discussing those malefactors who devised false traditions early in Islam, Mahmassani cautions:

But this should not be taken to imply, as a number of orientalisists have alleged, that every tradition should be considered false until the contrary is proven. The doctors of the science of the traditions did not accept traditions uncritically . . . [I]n their search for chains of authority, accuracy and trustworthiness, they had established a scientific and truthful criterion which made the study in this field reliable and trustworthy.

*Id.* at 76.

123. A. HASAN, *supra* note 26, at 12-13.

124. *Id.* at 29 n.17. The assertion, of course, overstates Schacht's position.

125. *Id.* at xv-xvi.

126. *Id.* at 90.

127. *Id.* at 92-93.

128. *Id.* at 95.

Only when the empire expanded greatly and a sure contact with the true Muslim practice faded under the Umayyads (and to some extent under the schools) did the necessity for reliance on the *ahadith* arise. As practice and the traditions grew apart, it became necessary to find an alternative extrinsic means to verify the traditions. Hence the *isnads* came into play. Hasan denies that there were wholesale fabrications, even though the *isnad* scholars rejected most of the traditions that they scrutinized. True, some forgeries did occur, but Hasan explains the phenomenon as resulting from the deterioration of the morals of the Muslim community, the permission granted for the free transmission of *hadith*, and the rise of heresies.<sup>129</sup> Hasan's view is that the newly articulated traditions returned the Muslims to the true practice at the time of the Caliphate.

By positing a simultaneous early development of practice and *hadith*, Hasan explains why the schools were more interested in an idealized practice (the living tradition) and why they harkened back to the Companions, rather than the Prophet. But Hasan's construct does not sufficiently explain why the *ahadith* were so frequently at odds with the living tradition of the ancient schools, why the later traditions contradicted so much of earlier documented practice, and how the traditions could have maintained such accurate integrity when the conscious and explicit reliance on practice had gone so far astray.

In the final analysis, Hasan defends the traditions against Schacht by citing a few verses from the Qur'an,<sup>130</sup> by quoting sources Schacht had already found to be apocryphal,<sup>131</sup> and by declaring that he who disregards the good memory of the Arab race commits "a sin against history."<sup>132</sup> Schacht's conclusions are dismissed as "mere conjectures" requiring far more explicit proof.<sup>133</sup>

Another group of Muslim scholars have accepted Schacht, though some have a few reservations. They evince understandable

129. *Id.* at 94.

130. *Id.* at 48.

131. Compare Hasan's version of an epistle written by al-Hasan of Basra, *id.* at 89, with Schacht's evaluation, ORIGINS, *supra* note 5, at 229.

132. A. HASAN, *supra* note 26, at 109, quoting Fazlur Rahman.

133. *Id.* at 90. See *id.* at 28 n.1, 159.

Syed Mahmud-un-Nazir also disputes Schacht, but in general he simply quotes authorities Schacht has determined to be apocryphal, or merely denies Schacht's views by a straight counter-assertion. He too denigrates the implications of Schacht's researches as "mere conjectures." S. MAHMUD-UN-NAZIR, THE EARLY DEVELOPMENT OF ISLAMIC JURISPRUDENCE 16, 30 (1973). The work of Syed Riazul Hassan follows a like pattern. S. HASSAN, *supra* note 18, at 23.

hesitation however, in applying the full range of his conclusions to the body of the Shari'a. Majid Khadduri, for example, seems to have no trouble adjusting to Schacht's historic analysis. He simply acknowledges it as describing the way Islamic law developed and leaves it at that. However, he does not draw conclusions as to what this will do to the content of the traditional Shari'a.<sup>134</sup>

Similarly, Asaf A. A. Fyzee finds Schacht persuasive. He affirms that "until the contrary is proved, we must assume that [Schacht's position] is true."<sup>135</sup> Fyzee does suggest two minor reservations. First, he thinks that even the fabricated *ahadith* represent the developing usage of the Muslim community, and thus have some relevance for determining the content of Islamic law (this is similar to Gibb's view of the "documentary" value of the traditions).<sup>136</sup> Second, Fyzee suggests that the intense scholarship of the *hadith*-critics could have uncovered some genuine traditions which were not known to exist before.<sup>137</sup> Fyzee concedes that his reservations do not detract from the main thrust of Schacht's analysis but he attempts to limit the impact of Schacht's thesis on the substance of Islamic law. The classical theory, Fyzee concludes, has a certain value for the lawyer, the historian and the student of civilization. Schacht's "modern critical theory" on the other hand, "pays little regard to ethical and spiritual norms." Though it has "scientific value, . . . it cannot stand alone. A careful study of both theories is essential for a modern, critical student of the law . . . ." <sup>138</sup> Nowhere, however, does Fyzee give any indication of how the classical and the modern theories can be harmonized.

Finally, there is the unusual work of Ahmad Ibrahim.<sup>139</sup> As with many other Muslim scholars, his thesis is eclectic and lacks rigorous consistency. He cites and accepts Schacht's theory, for example, but still affirms many of the tenets of the traditional Islamic viewpoint. He follows Schacht's version of the development of the ancient schools, yet in places, he mirrors Hasan's scheme.<sup>140</sup> He allows that Mohammed's mission was primarily religious and not legal, and he also admits that many of the traditions may not be historically

134. Khadduri, *supra* note 16, at 3-13; see also M. KHADDURI, ISLAMIC JURISPRUDENCE 3-7, 37-38 (1961).

135. A. FYZEE, OUTLINES OF MOHAMMEDAN LAW 27 (4th ed. 1964).

136. *Id.* at 19.

137. *Id.* at 29.

138. *Id.* at 31.

139. A. IBRAHIM, SOURCES AND DEVELOPMENT OF ISLAMIC LAW (1965).

140. *Id.* at 67-69.

accurate.<sup>141</sup> At the same time, however, he insists that the *ahadith* are authentic, and that the Sunna is binding.<sup>142</sup>

It would be easy to place Ibrahim's thesis among the works of other Muslim scholars who never rise above eclecticism. But there is a thread in Ibrahim's work which indicates that he has taken the first steps towards re-evaluating Islamic law in the light of the writings of Joseph Schacht. Ibrahim hints that the ancient schools of law may have been truer to the original basis of Islam than were the traditionists. Although in some passages he asserts that the traditions represented the values of the sunna of the early Muslims, elsewhere he accepts Schacht's view of the dichotomy between the traditionists and the learned men of the schools.<sup>143</sup> He states that the sunna of the regions and the schools had as "its starting point the ideal *Sunnah* of the Prophet,"<sup>144</sup> and that through the exercise of *ijtihad* and *ijma*, this sunna grew creatively to meet the conditions of Islamic life. But the Party of Tradition was "impatient with the slow moving but democratic *ijma* process, recommended the substitution of *hadith* for the twin principles of *ijtihad* and *ijma* and relegated these to the lowest position and severed the organic relationship between the two."<sup>145</sup> The success of the traditionists stifled the development of Islamic law.

Ibrahim does not shirk from criticizing the revered Shafi'i for demanding "an agreement which left no room for disagreement."<sup>146</sup> By cutting himself off "from the natural and continuous development of doctrine in the ancient schools," Shafi'i relied on a "new idea of the *Sunnah* as embodied in formal traditions."<sup>147</sup> The older democratic and organic mode which "tolerates and indeed demands fresh new thought" was replaced by a more "manufactured" and "static" formulation.<sup>148</sup>

Ibrahim does not develop his theory sufficiently, nor is his work free from contradictions. But it is clear that he believes that Islamic law would have been better off if it had been allowed to grow organically, applying the fundamental norms underlying the Qur'an according to the differing circumstances of successive ages, rather than being iron-bound in the rigors of the *ahadith* of the third Is-

141. *Id.* at 14, 41.

142. *Id.* at 13, 109.

143. *Id.* at 14, 69, 56.

144. *Id.* at 18.

145. *Id.*

146. *Id.*

147. *Id.* at 64.

148. *Id.* at 18, 19.

lamic century and in the subsequent interpretations of the Sunni schools.<sup>149</sup>

#### IV. JOSEPH SCHACHT AND THE FUTURE OF ISLAMIC JURISPRUDENCE

When historic research showed clearly that the Qur'an was not a separate piece of divine legislation, but contained a transformed version of pre-Islamic Arabian law, nearly all Muslim scholars were able to accept that fact. Why is it that they have had such difficulty accepting Schacht's revision of the source of the Sunna, when they could easily modify their perception of the Qur'an itself?

Any reader who surveys recent Muslim legal literature cannot help but notice the defensiveness which permeates most of the works. Apparently, there is great fear for the integrity of the Islamic legal tradition. Islamic scholars have been particularly proud of the rigorous manner in which the classical technique of *hadith*-criticism was conducted. Indeed, law was and still remains the master Muslim science.<sup>150</sup> It is understandable that when told that the *hadith*-scholars had been missing the mark for so many centuries, a pride in a unique study was undercut. The irony is that Muslim science has always maintained that authenticity is a human matter, and that the efforts of independent investigation must be respected.<sup>151</sup>

The greatest fear of the Muslim legists is, however, that the end of the authenticity of the *ahadith* will mean the destruction of the greater part of the Shari'a. There is a fear that the work of the great systematizers will collapse if the material they worked on is shown to have been the creation of human minds. This fear is unfounded.

There is no reason to disregard the rules of law which have been deduced from the traditions (or, more accurately, justified *post hoc* therefrom). The fact that the *ahadith* have been used by the Muslim community for so long, that so many great jurists have accepted them and worked on them, and that they were created in an era of religious reform, means that they need not be scuttled as if in conflict with the Qur'an. Even though the Sunna can no longer be held to be a separate source of divine legislation, its role and history in Islam means that it ought to continue to merit great respect.

It may no longer be the Sunna of the Prophet, but it remains the Sunna of Islam, and, like the great principles of the English

149. *Id.* at 108.

150. H. GIBB, *supra* note 7, at 7.

151. The orthodox Mahmassani respects the efforts of the Salafiyah school in Egypt to review formerly accepted traditions on the basis of formal criteria. S. MAHMASSANI, *supra* note 10, at 76.

common law, should be held controlling unless substantial reasons justify change. Thus, though the Sunna can no longer be considered divine and unalterable, it still provides the bedrock for the Islamic legal system.

Furthermore, the Islamic legal system itself contains the methods to ensure that any doctrine in the Sunna which needs to be changed will be revised for only the most specific principled reasons. The mechanisms of *qiyas* and a liberalized *ijma* can guarantee that any reform of the legal content of the Sunna will be both gradual and made only for good juristic reasons. Similarly, the devices of *istihsan*, *istihlah*, and *istidlal*<sup>152</sup> can be used more creatively to develop new law in deference to but not imprisoned by the human inventions of the second Islamic century.

Islamic law possesses the tools not only to maintain respect for the Sunna, but also to develop new rules of law from it and from other principles. Schacht's views do not wipe away the relevance of the Sunna, but they do provide a golden opportunity for principled reform in Islamic law. Thus, the question returns. Why do not the legists accept and use his discoveries in the traditional manner of the creative period of Muslim scholarship?

The answer seems to be that Muslim legal scholarship remains tied down by the doctrine of *taqlid*.<sup>153</sup> Conservative legal elements continue to reject any reform which may violate the norm of *taqlid*. They steadfastly insist that society must "conform to the terms of the divine law objectively determined."<sup>154</sup> To the Muslim locked into a belief in the divine sources behind the *ahadith*, any wavering on the Sunna "must undermine the very roots of the religious faith itself."<sup>155</sup>

Great Muslim minds, even some opposed to Schacht, continue to rebel against *taqlid* and assert that *ijtihad* should be freed to do its creative work once again. Anis Ahmad Siddiqi writes, for example, that *ijma* did not close the door to *ijtihad* and that it is in the highest traditions of Islam to practice *ijtihad*.<sup>156</sup> Rahim claims that *taqlid* is not in harmony with the theory of Islam,<sup>157</sup> and Aziz Ahmad, evincing the hope that the days of *taqlid* are numbered, declares that the "law deduced by *ijtihad* changes and should

152. See note 37, *supra*.

153. Anderson, *Modernization: Islamic Law*, in *NORTHERN AFRICA: ISLAM AND MODERNIZATION* 73-75 (M. Brett ed. 1973).

154. *CONFLICTS AND TENSIONS*, *supra* note 10, at 112.

155. *Id.*

156. A. SIDDIQI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 70 (1963).

157. A. RAHIM, *supra* note 19, at 173.

change in the circumstances and habits of the people."<sup>158</sup>

Even Said Ramadan, who is critical of Schacht, thinks that *taqlid* has restricted new thought to what was already proclaimed by the schools. He calls for the emancipation of *ijtihad* from the schools, though not in the direction that Schacht indicates, but rather back to thinking solely on the principles of the Qur'an and the Sunna.<sup>159</sup>

Many Muslim scholars realize that under present limitations imposed by *taqlid*, the Shari'a is simply irrelevant to coping with contemporary legal problems. Fyzee, for example, suggests that law and religion be separated so that modern legislation can proceed without the restrictions imposed by the Shari'a.<sup>160</sup> Such a separation has been artificial in Muslim culture since the time of the traditionists, but the rigidity of the Shari'a forces modern scholars to opt for it. On the other hand, Schacht asserts that Mohammed himself made binding rulings primarily on religious, not legal matters.<sup>161</sup> Therefore Fyzee's formula may comport more faithfully with the practice of the Prophet.

Many defenders of the Shari'a prefer that modern legislators not attempt to justify new reforms by a tortuous reference to the Shari'a. They prefer that the sacred law of Islam remain unsullied by modern reinterpretations.<sup>162</sup> In their supposed protection of the Shari'a, these scholars admit its modern irrelevance. Nor are they without influence. Indonesian officials rejected a call for a new *ijtihad* in their country.<sup>163</sup> At an Islamic colloquium in Lahore in 1957, some delegates called for the withdrawal of a paper which urged a new evolution of thought, and suggested ignoring some outdated Qur'anic texts.<sup>164</sup> The rigidity of the Shari'a forced the Turks — the earliest modern reformers in the Middle East — to abandon it in favor of structuring a new code. During World War I the Turkish reformers despaired of the legists who could only quote traditions. "The Islamists," one reformer said, "explain simple matters of common sense by quotations from the books of *hadiths*. What a pity it is for men to believe themselves devoid of reason and depen-

158. AZIZ AHMAD, *supra* note 20, at ii.

159. S. RAMADAN, *supra* note 15, at 64-73. See also A. HASAN, *supra* note 26, at 222-23; A. IBRAHIM, *supra* note 139, at 109.

160. A. FYZEE, *supra* note 135, at 39.

161. See pp. 9-10 *supra*.

162. ISLAMIC LAW, *supra* note 2, at 24.

163. D. LEV, ISLAMIC COURTS IN INDONESIA 238-39 (1972).

164. M. HALPERN, THE POLITICS OF SOCIAL CHANGE IN THE MIDDLE EAST AND NORTH AFRICA 26-27 (1963).

dent upon books of tradition on matters which are nothing but simple matters of logic . . . ."<sup>165</sup> In the 1930's Egyptian reformers (including those who had enshrined *ijma*) attacked the traditions as spurious in their struggle to be free of the weight of the Shari'a.<sup>166</sup> The success of al-Sanhuri in modernizing the Egyptian legal system lay in the very fact that he never made a rigorous theoretical justification for his reforms.<sup>167</sup> To do so would have meant confronting classical Islamic theory in a battle he could not hope to win.

But the champions of renewed *ijtihad* are many. They include the poet Iqbal, who pointed out that *taqlid* was turning the Shari'a into a "fossil," and who wanted to free Islam from the stamp of "Arabian Imperialism."<sup>168</sup> He declared that the "closing of the door of *ijtihad* is pure fiction."<sup>169</sup> The nineteenth century reformer Mohammed 'Abduh, who doubted the authenticity of many traditions, said that *ijtihad* was not only permitted, it was "essential."<sup>170</sup> 'Abduh's renewed *ijtihad* had as its object the purification of Islam, not its destruction.<sup>171</sup>

The defenders of *ijtihad* have always been present. They reach back to Ibn Taimiyya (d. 1328 A.D.) who ironically was a Hanbali, the most *hadith* bound school of them all.<sup>172</sup> Their numbers grew in the 18th century, when new interest was caused by the influx of western culture,<sup>173</sup> and they continue to assert themselves in modern times, when men such as Ameer Ali have declared that Islamic law was in a state of:

stagnation . . . principally due to the notion . . . that the right to the exercise of private judgment ceased with the early legists, that its exercise in modern times was sinful, and that a Muslim in order to be regarded as an orthodox follower of Muhammad should belong to one or other of the schools established by the schoolmen

165. N. BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 384 (1964).

166. F. ZIADEH, *supra* note 4, at 118. Earlier, Ahmad Safwat claimed as much right to *ijtihad* as the third century scholars. *Id.* at 119.

167. M. HALPERN, *supra* note 164, at 126.

168. E. ROSENTHAL, *ISLAM IN THE MODERN NATIONAL STATE* 197 (1965).

169. *Id.* at 206. Other men, such as Ghulam Parwez followed Iqbal and rejected the *ahadith* by limiting the Sunna solely to the Qur'an. *Id.* at 208.

170. A. HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE 1798-1939* 147 (1970). See Anderson, *Land Reform in Egypt: 1850-1950*, in *POLITICAL AND SOCIAL CHANGE IN MODERN EGYPT* 225 (P. Holt ed. 1968); M. KERR, *ISLAMIC REFORM* 103-52 (1966).

171. E. ROSENTHAL, *supra* note 168, at 67.

172. See *The Law*, *supra* note 49, at 77; Schacht, *Theology and Law in Islam*, in *THEOLOGY AND LAW IN ISLAM* 6 (G. von Grunebaum ed. 1971); E. ROSENTHAL, *supra* note 168, at 13, 15.

173. E. ROSENTHAL, *supra* note 168, at 71-72.

of Islam, and abandon his judgment absolutely to the interpretation of men which lived in the 9th century and who could have no conception of the necessities of the 20th.<sup>174</sup>

Two years after Schacht's *The Origins of Muhammadan Jurisprudence* was published, the Council of the Academy of Islamic Studies in India circulated a "call" for a "reappraisal of the corpus of *hadith*, with a view *inter alia* to a possible reformulation of law."<sup>175</sup>

In the main, the attempts at a renewed jurisprudence have failed. Instead, reforms have taken place by the device of picking and choosing between the schools, by *siyasa* (the "right" of executive regulation), by eclecticism, or by outright rejection of major portions of the Shari'a. There has not been a "new *ijtihad*,"<sup>176</sup> but rather an unsystematic borrowing from legal systems both within and without Islam. The technique mirrors the practice of the early Muslims when they had conquered new lands,<sup>177</sup> but it fails to approach the later systematic and analytical development of legal conceptions which is the hallmark of true *ijtihad*. In the Middle East today, the mixed nature of the law stands more as a rejection of the classical Islamic legal heritage than a continuation of it.<sup>178</sup>

Henri Pirenne has noted that, unlike the Germans, the Arabs did not adopt the faith of their conquered populations. They were "exalted by a new faith,"<sup>179</sup> and their beliefs took root. When later peoples, such as the Turks, conquered the Arab lands, they did not displace, but absorbed the Islamic faith. But this is not what has happened in the twentieth century. Western law has invaded the Muslim world, not to be "Islamicized," but to displace much of the Shari'a. *Taqlid* and classical Islamic legal theory has been unequal to the challenge of the West. A stubborn atavism is not a creative response.

It is here where Schacht's service to Islamic law becomes most salutary. He has made it possible for this great legal tradition to free itself from an unthinking bondage to issues relevant to the second Islamic century, and thus open anew the gate to *ijtihad*. *Mujtahids* need no longer fear they are revising divine law when they develop

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174. Quoted in D. MULLA & M. HIDAJATULLAH, *supra* note 33, at xxviii. See also MODERN TRENDS, *supra* note 34, at 97.

175. W. SMITH, *supra* note 8, at 13 n.3.

176. *Contra*, HISTORY, *supra* note 14, at 208-17.

177. *The Law*, *supra* note 49, at 77, 83.

178. *Contra*, HISTORY, *supra* note 14, at 7.

179. H. PIRENNE, MOHAMMED AND CHARLMAGNE 150 (1961).

the traditional norms of Islamic law beyond the confines imposed by *taqlid*. The Sunna of Islam remains the way of the Prophet's devout followers, even though it may not be the way of the Messenger himself. In this fashion, respect for the Sunna and the authority of its rules can continue, but as its source can no longer be determined to be divine, a principled and creative reform can take place making the Shari'a once again a dynamic legal force contending with the current problems of Muslim society.