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A General Model

1.1. Revisability and Indeterminacy

When a contradiction comes to light in a belief system, the system tends to make adjustments to remove the discrepancy. Some component(s) of the system must be given up and replaced to maintain overall coherence. But which? Let us assume a belief system made up of several components: the body of laws of a legal tradition (*madhhab*); the reasons given for those laws; general legal-methodological principles stipulating what counts as a valid reason; and theological, linguistic, philosophical, and historical tenets. In principle, any of these components might be rejected and replaced. In practice, however, some components are held relatively immune to rejection, as exemplified by the immunity granted in Muslim legal discourse to such "higher level" assumptions, respectively theological and historical, as the authority and authenticity of the Qur'ān. That much is unsurprising. More interesting is the study of what happens to the less immune, more revisable parts of the system, especially such "lower level" components as (1) the laws themselves (e.g., "drinking date wine is forbidden," or "is licit"); (2) the exegetic rationales for the laws (statements of the sort, "this Qur'ānic verse is qualified by that saying of the Prophet," or "this verse is abrogated by that one"); and (3) general legal-methodological or hermeneutic principles governing and disciplining the use of exegetic rationales (e.g., "particular statements qualify general ones," or "a Qur'ānic law is not abrogated by an earlier law").

Historical investigation shows that these three classes are not equally revisable. One may imagine a continuum of revision approaches. At one end of the gamut, one always holds the needed or desired laws absolutely

immune and adjusts the rationales for specific laws (and, if need be, modifies even general methodological principles), making the smallest changes necessary to preserve the laws. At the other end of the gamut is the approach that grants no measure of prior immunity or stability to the laws; rather, it always lets stable methodological principles determine the exegetic rationales and the laws. Historical inquiry may clarify where on the continuum between these endpoints a school or an individual jurist is found.

Moreover, just as the class of exegetic rationales as a whole may be found to be more (or less) revisable and historically unstable than the class of laws as a whole, specific types of exegetic rationale may be more vulnerable to revision than others. Different types of exegetic rationale (qualification, abrogation, etc.) are not used equally in the revision process.[1] Where jurists have a choice of two or several methods of getting the job done, they are liable to consistently prefer one type of argument to another. It should be possible, then, to derive a hierarchy of preference. Doing so would be part of reconstructing a school's or a jurist's methodological approach.

The line of inquiry laid out here requires identifying contradictions and examining how they are resolved. How easy is it to find such cases? Any vast and complex system of jurisprudence can be expected to contain contradictions arising from the sheer difficulty experienced by jurists in keeping track, simultaneously, of all principles and rationales and their consequences. Discrepancies of this type may require some effort to detect. Conspicuous contradictions can also arise from specific historical processes. And as a matter of historical fact, Islamic law developed in a way that generated such contradictions on a massive scale.

Islamic law evolved as the judgment of jurists. In the first two centuries of Islam, some of these decisions reflected practices that had always been part of the life of the community, ever since the Prophet Muḥammad had introduced them. Other decisions reflected local customs of non-Prophetic origin: tribal law, personal preference, and ad hoc decisions. These laws of non-Prophetic origin sometimes supplemented the Prophet's laws and sometimes supplanted them.[2] Another important feature of law in

[1] Revision consists of a rejection followed by a replacement. So it is not only the choice of what is rejected that presupposes a methodological approach but also the choice of its replacement.

[2] An example of the latter is the emergence in first-century Medina and Kūfa of the prohibition of women going out to the mosque despite the Prophet's approval of the practice. Mecca and Baṣra, by contrast, preserved the status quo. This subject is treated in a separate work I have under preparation.

this period was that legal opinions clustered along geographic lines. For example, the legal opinions in Baṣra tended to be closer to one another than to those from Medina, and vice versa.

In this early period, law did not primarily derive from the reports about the Prophet (*Ḥadīth*) and his Companions, at least not in the circles from which the earliest surviving legal traditions emerged, namely the Ḥanafī and Mālikī schools of law.[3] Law and such reports had developed in parallel and certainly overlapped, but there were also significant divergences

[3] This need not be explained as a result of the *Ḥadīth* being chronologically secondary to the laws. Rather, the point is that the traditionists (i.e., *ḥadīth* transmitters and scholars) and jurists (*fuqahā'*) formed distinct though overlapping groups: most traditionists were not jurists, and a good many jurists were minor or poor traditionists. The two fields could thus undergo changes independently of each other. Indeed, the earliest jurists would have been aware of only a fraction of the reports in circulation. A Kūfan jurist such as Abū Ḥanīfa worked with a subset of the reports that circulated in Kūfa, including a small number of traditions that originated in other cities. Knowledge of traditions current in other cities reached Kūfa gradually, and on a massive scale only in the second/eighth century. While some sources identify the *Ḥadīth* movement with Medina and the *ahl al-ra'y* with Kūfa, these two authors have argued that both approaches were present in both cities: Joseph Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1967), 228–57, and 'Abd al-Majīd Maḥmūd, *al-Madrasa al-fiqhiyya li-al-muḥaddithīn* (Cairo: Maktabat al-Shabāb, 1972), 19–79.

Another reason is that many of the earliest jurists of the early regional schools of law, to which the proto-Mālikīs and the proto-Ḥanafīs belonged, did not consider *ḥadīth*s as binding in the forceful and consistent manner that became increasingly common after al-Shāfi'ī. Schacht noted that they preferred the living traditions of their respective cities to *ḥadīth*s. From this, Schacht concluded that they did not always consider the Prophet's *sunna* as binding. Though, he added that eventually some of them came to identify their living traditions with the *sunna* of the Prophet, which they now considered binding; see Schacht, *Origins*, 80. On the other hand, Dutton has argued that Mālik considered the living tradition of his city, Medina, as a better guide to the true normative practice of the Prophet (i.e., the *sunna* of the Prophet): for example, an authentic *ḥadīth* may describe a one-off practice of the Prophet, whereas community practice preserves the truly normative practice of the Prophet. Thus, to the question of whether the *sunna* of the Prophet had always been considered binding, Dutton gives a different answer than Schacht would. Nevertheless, Dutton agrees with Schacht's observation that *ḥadīth*s were not absolutely binding; he just does not completely equate *ḥadīth*s with Prophetic *sunna*. This common ground about the *Ḥadīth*, which is confirmed also by Gurāyā's reading of Mālik's *Muwaṭṭa'* and my reading of al-Shaybānī, is what underpins my statement that law was not primarily based on the *Ḥadīth*. See Muḥammad Yūsuf Gurāyā, *Origins of Islamic Jurisprudence* (Lahore: Muḥammad Ashraf, 1985), 116–20; Yasin Dutton, "'*Amal* v. *Ḥadīth* in Islamic Law: The Case of *sadl al-yadayn* (Holding One's Hands by One's Sides) when Doing the Prayer," *Islamic Law and Society* 3 (1996): 13–40; Yasin Dutton, *The Origins of Islamic Law* (Surrey: Curzon, 1999), 168–77; cf. Hallaq, *The Origins and Evolution of Islamic Law*, 102–21. For a different theory, see M. Mustafa al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence* (Oxford: Oxford Centre for Islamic Studies, 1996).

between them in proto-Ḥanafī and proto-Mālikī quarters.[4] By the third/ninth century, the strengthening of the "Ḥadīth Folk" movement had led to much wider acceptance of Prophetic *Ḥadīth* as a source that trumped any nonrevealed or nontextual source of law. This concession on part of jurists confronted them with contradictions between the existing laws and the *Ḥadīth*. They could no longer ignore *ḥadīth*s that did not fit the law. They were thus faced with a choice: they could clear the legal slate and recreate the law in the image of the *Ḥadīth*; they could preserve the law and explain away the *Ḥadīth*; or they could seek some kind of compromise. Much of the energy and genius of *ḥadīth*-oriented jurists in the following centuries was directed at resolving these contradictions.[5] It is by examining just how jurists in the following centuries went about restoring consistency that one can best uncover their methodological approaches. Part of this task involves determining which components in legal deductions are historically more stable than others.

The two extremes of the range of methodological approaches mentioned previously correspond to differing conceptions of the nature of legal reasoning in the postformative period. (The "postformative period" is defined, for my purposes, as the period after the birth of the Ḥanafī legal tradition in the second/eighth century.[6]) The approach that has hermeneutic principles generate and determine the laws perhaps represents the more usual understanding of Islamic law. According to this conception, represented in Figure 1 (a), the laws logically derive from, or have as their source and starting point, the Qur'ān and the *Ḥadīth*. The jurist's task is to transform the raw materials of the Qur'ān and the *Ḥadīth* into the finished product of the laws (*aḥkām*) that may be readily applied to any circumstance. The transformation is supposed to be effected by fixed hermeneutical methods and legal-methodological principles. The jurist feeds the sources into this methodological machine, turns the crank

[4] For the other schools, the question remains open. Al-Shāfi'ī argued for the absolutely binding quality of Prophetic *ḥadīth*s. But it remains an open question whether, in fact, instead of clearing the legal slate and beginning anew with the *Ḥadīth* as his starting point, legal inertia did not compel him to rationalize away the *Ḥadīth* where they disagreed with some of the legal concepts he had inherited. One must examine this question through the chapters on positive law in *al-Umm* rather than through his *Risāla*, which, being on methodology, may conceivably use concrete examples in a selective manner that may not fairly represent the overall character of his jurisprudence.

[5] On the impact of Ḥadīth-Folk ideology, see also Joseph Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1966), 35–6; Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.* (Leiden and New York: Brill, 1997).

[6] See Section 2.1.

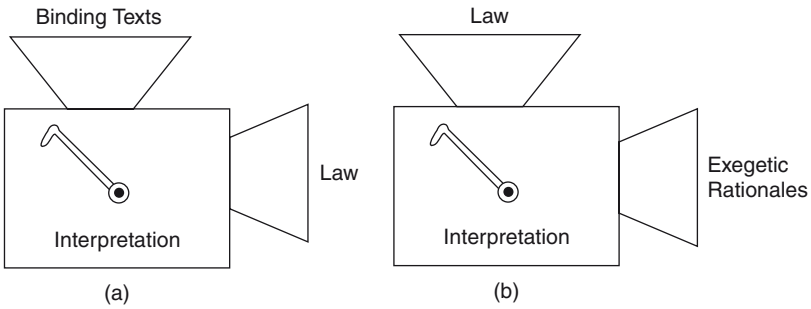

FIGURE 1. Two different conceptions of textual exegesis in legal interpretation.

(performing *ijtihād*), as it were, mechanically processing the sources in accordance with the hermeneutic principles, and finally receives the law at the output. The fallibility and uncertainty of the process and most of the laws it is taken to generate are readily acknowledged, though their subjectivity is not. The process is thought to be objective in the sense that if any other jurist were to turn the crank, the output would be the same or at least within the certified margin of objective uncertainty, thus falling within a bounded set of acceptable legal solutions. The undisciplined, personal discretion of the jurist plays no role. This way of looking at the law allows one to speak of the "discovery" of the law, of "the search for God's law," or of "deriving the law" from the Qur'ān and the *Ḥadīth*.[7]

The other end of the gamut, where the laws are constant or, if they change, they do so not because of hermeneutic/methodological considerations but rather because of extralegal changes such as new social circumstances or needs, corresponds to an altogether different conception of how postformative law operates, represented in Figure 1 (b). Here, the input to the machine consists not only of the Qur'ān and the *Ḥadīth*, but also of the law to be justified – that is, preexisting or newly needed or desired law – which is precisely what the first conception would take to be the end-result of the process. The output consists of a valuation of the textual raw materials that would preserve consistency with the law – in

[7] A more sophisticated development of this position would be to say that a jurist's discretion plays the role of offering laws that serve as hypotheses that may be refuted or confirmed by the evidence. Thus, the testability of the laws makes them responsive and accountable to the evidence of the Qur'ān and the *Ḥadīth*. This would still allow one to speak of the "search" for God's law and its "discovery." It would allow one to speak of an objective margin of uncertainty inasmuch as the evidence and the hermeneutic techniques leave some limited room for maneuver. It would allow one to speak of "deriving" the law from the evidence if one is an inductivist, but not if one is a deductivist.

other words, an assessment of the form: this *ḥadīth* was abrogated, that general statement should be understood in a restricted sense, this tradition is not authentic, and so on; to wit, mainly a selection of exegetic rationales. The effect of such an exercise is to prove the consistency of the preexisting or newly desired laws with the binding texts (Qur'ān and *Ḥadīth*).

One set of interpretive rules may be more powerful than another set in terms of the ability to determine the laws. Thus, the previously provided conceptualization of the possible methodological approaches can be related to the inherent logical capacities of groups of hermeneutic principles to determine the laws. (As defined in the first paragraph, "hermeneutic principles" specify how the different types of exegetic rationales can be used. For example, they may set forth the proper way to use analogy, abrogation, or qualification.) To that end, let us think of a hermeneutic-methodological approach as having a fixed selection of hermeneutic principles. Every jurist has some such principles that are implicit in the way he/she operates, regardless of whether he/she states them explicitly or is even conscious of them. Moreover, it is possible to speak of the hermeneutic-methodological approach of a school of law in a given time interval as an approach that typifies the approaches of the jurists working in that legal tradition in that period. One could then locate different methodologies on a spectrum. At one end of the spectrum, the approach is so stringent that it allows no latitude in what the law must be: a mechanical application of the hermeneutic principles to the textual evidence produces a unique legal outcome. This inflexible, deterministic approach corresponds to the vision of Islamic jurisprudence in which law is the outcome of the process of interpreting the foundational texts. At the opposite end of the spectrum, there is unlimited latitude in the legal outcome; the hermeneutic principles are so flexible that exegetic rationales can be found to show any conceivable law as consistent with the textual sources.[8] Because any and all candidates for the law can be harmonized with the texts, the hermeneutic principles cannot be said to determine any law, and the law cannot be the outcome of the process of interpretation. Interpretation serves to justify the laws rather than determine them. Thus, the test of the hermeneutic flexibility of a hermeneutic-methodological approach is how likely it is that any arbitrarily chosen

[8] This would be an "unfalsifiable" system, to use Karl Popper's term, as no conceivable outcome could be ruled out. See Karl Popper, *The Logic of Scientific Discovery* (London: Hutchinson, 1959).

candidate for a law can be justified within the system. To be sure, neither of these extremes necessarily existed in reality, but every methodology that has existed can be placed somewhere on that spectrum. So, one can study how different jurists' or legal schools' places on that spectrum compare to one another or change over time.

We have just seen how revisability relates to hermeneutic flexibility. However, one does not investigate the two issues in exactly the same way. To learn whether one component of juristic argumentation (e.g., the reasons given for the laws) is more or less revisable/unstable than another component (e.g., the laws), historical investigation suffices: for example, one simply tallies up the laws and the reasons given for them after tracing them over time. The study of hermeneutic flexibility, however, shifts the attention from historical analysis of how the law developed to logical analysis of the methodological approaches, aiming to determine the degree of freedom or flexibility they inherently possess. Historical analysis, of course, is needed to reconstruct a jurist's methodological approach. That is to say, by studying that jurist's reasons, one may be able to determine the hermeneutic principles, if any, inherent therein. But once the methodology is known, in principle no historical analysis is needed to determine the flexibility and capacities of that methodological system. Given knowledge of the methodological approach, the level of flexibility can be determined through logical analysis. Accordingly, one may form a sense of the ways the law could have developed, a sense of the extent of the space of logical possibilities, which (depending on the given methodological approach) may be larger than what history has actually made use of.

What is the best way of reconstructing a methodological approach and, in particular, determining the level of hermeneutic flexibility? What kind of a test case is most suited for the purpose of historical analysis?

To begin answering that question, it helps to consider how the logical structure of a methodological system affects actual legal thought, setting bounds within which historical reality can unfold. A hermeneutically flexible methodology allows jurists to maintain any legal position they advocate by neutralizing seemingly contrary evidence. In particular, the law advocated could be one that the jurist prefers for reasons unrelated to the binding foundational texts – for instance, because it is the established law or because as a new law it would better fit current social conditions and values. But if a methodology rigidly maps the evidence into unique law, leaving little latitude in the choice of the law, then the jurist is typically forced to abandon any legal outcome other than the one determined by

the methodology. So, hermeneutic flexibility correlates with the freedom of the jurist to neutralize conflicting textual evidence.

Moreover, as mentioned earlier, maximal hermeneutic flexibility allows jurists to justify any candidate for the law. Generally, the candidates most difficult to justify tend to be those that oppose the apparent meaning of the absolutely binding texts (the canon, for short). These tend to form the toughest test cases of hermeneutic flexibility. Therefore, optimal test cases for baring methodological commitments are those in which the binding texts seemingly clash with a jurist's position, or with what a jurist would have ruled if it were not for the binding texts. Such a confrontation can result from different processes. An obvious one has been explained already, namely the conflict, after the triumph of Ḥadīth-Folk ideology, between the apparent meaning of some Prophetic reports (*ḥadīth*s) on the one hand, and the inertia of the laws of a legal tradition, such as the Ḥanafī school of law, on the other hand. In such a case, the inherited law disagrees with the apparent purport of Prophetic reports. Cases in which the majority position on a point of law changes are also revealing from a methodological standpoint.

1.2. A General Model of Decision Making and Exegesis

1.2.1. *Motivation: The Islamic Case*

According to Joseph Schacht, postformative Islamic jurisprudence was marked by what he called the régime of *taqlīd*, which began setting in around AD 900. In this period, retrospective justification of the early legal positions of the schools summed up the work of jurists; the originality of jurists lay not in the revision of the laws, which were static, but in the process of justifying existing law.

> Even during the period of *taklīd*, Islamic law was not lacking in manifestations of original thought in which the several schools competed with and influenced one another. But this original thought could express itself really in nothing more than abstract systematic constructions which affected neither the established decisions of positive law nor the classical doctrine of the *uṣūl al-fikh*.[9]

The new rigidity characterized not only the legal schools when viewed as wholes, but also even individual jurists. To be sure, there were those who claimed the right to form legal opinions independently from their school's juristic precedents. "But these claims, as far as positive law was

[9] Schacht, *Introduction*, 71–2.

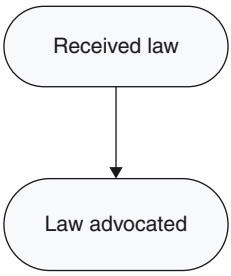

FIGURE 2. Model of postformative decision making: the laws remain as they were before.

concerned, remain theoretical, and none of the scholars who made them actually produced an independent interpretation of the *sharī'a*."[10] Figure 2 best captures Schacht's theory of legal change.

Inevitably, the result was an increasingly widening gap between the law and the changing social reality.

> Islamic law, which until the early 'Abbāsid period had been adaptable and growing, from then onwards became increasingly rigid and set in its final mould. This essential rigidity of Islamic law helped it to maintain its stability over centuries which saw the decay of the political institutions of Islam. It was not altogether immutable, but the changes which did take place were concerned more with legal theory and the systematic superstructure than with positive law. Taken as a whole, Islamic law reflects and fits the social and economic conditions of the early 'Abbāsid period, but has grown more and more out of touch with later developments of the state and society.[11]

Unsupported by detailed diachronic case studies, these views on postformative law represent first impressions. Though first impressions can convey a large kernel of truth, they can also be misleading. After all, notwithstanding some exceptions, postformative Muslim jurists were motivated to minimize their differences with the established precedents of their respective legal traditions. The importance of the precedents and authority of a jurist's legal tradition in Islamic jurisprudence is well-known.[12] In this respect, a Muslim jurist was not fundamentally different from a scholar of Jewish law or an American jurist.[13] For "the creativity

[10] Schacht, *Introduction*, 72.
[11] Schacht, *Introduction*, 75.
[12] See, for example, Wael Hallaq, "Was the Gate of *Ijtihād* Closed?" *International Journal of Middle Eastern Studies* 16.1 (1984): 10–11.
[13] The authority of the past in legal traditions is well-known. That it is a general feature of law, and not just Islamic law, has been noted in the field Islamic legal studies by Sherman

of exegesis consists not only in its ability to adjust to new circumstances not contemplated by the canon but also in the interpreter's claim that there is no innovative or transformative activity involved whatsoever: the interpreter merely elucidates the plenitude of truth already latent in the canon"[14] – a truism applicable not only to the canon, but also, to a lesser degree, to the interpretation of precedent. Accordingly, if a jurist did in fact diverge from the beaten path, he might not have gone out of his way to advertise that fact. It follows that the impression of a basically static law is suspect *ab initio* if not verified by diachronic case studies.

Schacht was right to highlight the salience of retrospective justification. However, his generalization that "none of the scholars" produced an independent interpretation is too sweeping. Others have shown (and this book confirms) that sometimes individual jurists departed from the established school position, and sometimes the school consensus changed.[15] While it is true that retrospective justification constituted a significant part of jurists' work, leaving the matter at that would beg the question of why laws changed or remained the same.

We know that while jurists did retain and justify most received laws, they also abandoned or modified a good number of them. Since the

Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (New York: E. J. Brill, 1996), 80–2 and 73.

[14] Bernard Levinson, *Legal Revision and Religious Renewal in Ancient Israel* (Cambridge: Cambridge University Press, 2008), 16. The author uses the word "canon" in more or less the same sense as I do.

[15] For change in the laws in the postformative period, see, in addition to the examples in this book, for example, the following: Hossein Modarressi, *Kharāj in Islamic Law* (London: Anchor Press, 1983); Baber Johansen, *The Islamic Law on Land Tax and Rent* (London: Croom Helm, 1988); Khaled Abou el-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001). For more on Schacht's views and a debate about them, see especially the following works of Wael Hallaq and Sherman Jackson: Hallaq, "Was the Gate of *Ijtihād* Closed?"; Wael Hallaq, "*Uṣūl al-fiqh*: Beyond Tradition," *International Journal of Middle Eastern Studies* 16.1 (1984): 3–41; and Jackson, *Islamic Law and the State*, 69–141. Hallaq's essays are reprinted in Wael Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Cambridge: Cambridge University Press, 2001). More recently, see the following valuable contribution: Wael Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

Jackson's book is exceptionally important, and it remains the most lucid discussion of legal change in the postformative period, though he misunderstands Hallaq. Jackson thinks incorrectly that his own position that the door of *ijtihād* was nearly shut and Hallaq's view that it was open are in genuine contradiction. In fact, they are not. Because the two authors use the word *ijtihād* in different senses, they are not talking about the same door. By *ijtihād*, Jackson has in mind reasoning that bypasses the authority of the legal school, while Hallaq's *ijtihād* subsumes, in addition, reasoning within the framework of the school's precedents.