The Logic of Law Making in Islam

Women and Prayer in the Legal Tradition

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Preface

What makes laws endure or change? When a law changes, how does a tradition of legal interpretation justify the innovation in light of its legal precedents and foundational texts? What is the function of the reasons given for laws? What relationship does law bear to social values? These interrelated questions fall under the heading of philosophy of law, yet it is mainly through the study of history that they can be probed. Answering these questions in different cultural and historical settings is a prerequisite for developing a general theory of law, for it makes distinguishing universal elements from culturally specific parameters possible. In particular, a culturally specific feature of Islamic law is its religious character. One may ask, therefore, whether the fact that Muslim legal traditions invoke sacred authority makes an essential difference to the way the questions posed above are answered. In other words, does sacred law operate in a fundamentally different way from secular law? This book explores these questions through a study of the largest legal tradition in Islam, namely the Ḥanafī school of law.

The book begins by creating a general model of juristic decision making that describes any legal tradition, Islamic or not, in terms of a number of parameters. It does not presuppose that all legal traditions are identical, for the parameters in the model may vary from one tradition to another. A central task of the book is to determine those parameters in the Ḥanafī case. This is achieved through diachronic historical case studies related to laws on women and prayer. The book examines how certain Ḥanafī laws, and the reasons Ḥanafī jurists gave for those laws, evolved from the eighth century to the eighteenth century as reflected in the opinions of some thirty jurists.

Premodern Islamic law as formulated in the four Sunnī legal traditions is sometimes described as the end product of the process of interpreting the foundational texts, namely the Qur'ān and the *ḥadīth*s (sayings of the Prophet). Jurists are said to have attempted to *derive* the laws from these sources. This impression owes to the fact that a legal reason (i.e., the reason a jurist gives for a law) often takes the form of a specific interpretation of the Qur'ān and *ḥadīth*s, suggesting that the process of interpreting these sources is what generated the law. On this view, these texts represented the starting point of jurisprudence, and the laws its outcome. The transformation of the textual raw material into the laws is said to have taken place through the application of established, recognized methods of interpretation, methods that are described in the classical Islamic genre of legal theory, the *uṣūl al-fiqh*.

The book shows that in fact, at least in the Ḥanafī case, this image must be turned on its head. What is thought to be the outcome of jurisprudence, namely the laws, are actually the starting point for the jurist. The end product, on the other hand, is an interpretation that reconciles the law with the textual "sources," the Qur'ān and the Prophet's sayings. The role of the methods of interpretation, therefore, is not to generate the laws, but rather to reconcile them with the textual sources. The hermeneutic standards governing the process of interpretation can be seen to be so loose as to be inherently incapable of generating laws. They are so flexible that they can be used to reconcile just about any conceivable candidate for the law with the textual sources. Providing maximal indeterminacy, these standards do not constrain the jurist to adopt one possibility (as to what the legal outcome should be in a given matter) to the exclusion of another.

If the binding texts (the Qur'ān and the *ḥadīth*s) and the standards of textual interpretation did not determine the laws, the question arises, what did? If the hermeneutic methods imposed no constraint on the laws, does this mean, then, that jurists had a free hand in fashioning the laws as they wished? No, in fact there were severe constraints on the laws. The primary constraint was imposed by the need for legal continuity: normally a law would not change, even if it failed to mirror new social values, as long as it did not become intolerable or highly undesirable. If a person living in the premodern period asked, "Why is this the law?" the correct answer would have been simply, "because this used to be the law," unless this was a new law, in which case the answer would have been, "because the old one became intolerable or highly undesirable due to new social conditions." On this account, present law was a function only

of the interaction between past law and new social realities; the reading of foundational sources played no causal role in the evolution of law although it may have played a role in its genesis. This account happens to be a good approximation of the dynamics of secular law, which have been delineated by the legal historian Alan Watson based on his studies in a variety of legal traditions. Thus, at least as far as the fundamental question of how present law relates to past law is concerned, the Ḥanafī legal tradition is similar to secular law notwithstanding its otherwise religious character.

The indeterminacy of the exegetical bridge that linked the laws with the textual sources had important historical ramifications for Ḥanafī jurisprudence. This bridge was constructed of *exegetic rationales*, that is, statements of the type, "this verse abrogates (or qualifies) that one." The flexibility with which exegetical rationales were deployed ensured that any conceivable candidate for the law could be reconciled with the binding texts, and, conversely, that changes in what counted as a binding text did not destabilize the laws. The exegetical bridge did not collapse when the ground shifted on either side of it. When the ground shifted on the side of the laws, for example, when the Ḥanafīs were compelled to change a law due to new social values or circumstances, hermeneutic flexibility allowed them to reconcile the new law with the textual sources, thus enabling legal change. On the other hand, when the ground shifted on the side of the textual foundations, hermeneutic flexibility served the interests of legal continuity by helping to protect the laws from the impact of the changing texts. This happened in the aftermath of the triumph of the Ḥadīth-Folk ideology in the ninth century, when many a *ḥadīth* that at face value contradicted established Ḥanafī laws came to be regarded as binding. This did not force jurists to give up the laws, for hermeneutic flexibility allowed them to neutralize the newly binding texts through interpretation. This episode represented an expansion of the textual basis, but in later centuries there were also contractions. The textual foundations diminished when the Prophetic sayings that had been cited in support of certain laws were disqualified for having been found inauthentic. This did not spell the end of the laws seemingly resting on the disqualified texts. Rather, the laws were furnished new justifications. Hermeneutic flexibility allowed jurists to devise new exegetic rationales to replace those based on the now-lost texts.

The metaphor of a pliable bridge stands for the malleability and revisability of legal reasons and, in particular, of exegetic rationales. Legal reasons (i.e., the reasons jurists gave for the laws) surrounded the laws,

forming a protective cushion that absorbed the impact of contrary evidence. The dispensability of legal reasons manifested itself in the historical pattern of the relative stability of laws compared to the reasons given for them. This historical pattern, combined with logical analysis, shows that even though legal reasons logically precede laws, there is an important sense in which they are secondary to the laws: reasons are actually devised to explain existing or newly desired laws. More often than not, they neither cause nor motivate the laws.

The Contribution Made by This Book

Academics are sometimes asked by their colleagues to enumerate concisely the ways in which their contributions differ from those of other researchers. I will do so briefly in the hope that it will be useful for some readers.

First, the broad characterization of juristic thought that I just sketched out and that I will flesh out in this book is largely original, though it certainly resonates with the works of other researchers in some of its particulars. To accept this new picture as a whole is to experience a gestalt shift in which familiar concepts are seen in a new light. For example, techniques such as abrogation, qualification, and analogy that are almost universally described in the academic literature as methods for generating the laws are now seen to operate in the reverse direction, with the laws as their starting point.

Second, the existing academic literature describes premodern methods of scriptural exegesis, but in doing so it normally relies on Muslim works of legal theory, the *uṣūl al-fiqh* genre, a field that was devoted to determining the proper methods of interpreting the Qur'ān and *Ḥadīth*. Scholars usually do not take into account that the principles that premodern legal thinkers expounded in this genre were not always applied in practice. To investigate hermeneutics in practice, one should examine the genres in which the laws were developed and justified, namely those of positive law (*fūrūʿ*) and legal opinions (*fatāwā*). To my knowledge, this is the first book-length and diachronic study of scriptural hermeneutics in postformative positive law.

Third, as a contribution to Islamic legal studies, this book is methodologically distinct. It is an explicitly framework-driven study. My intention is not to say all that is important about the Ḥanafīs or the legal case studies, nor to engage with every important result reached in recent scholarship. Rather, the study narrowly pursues specific objectives: I approach

the legal case studies to investigate the questions generated by the framework devised in Chapter 1, a schema that is well suited to comparative study and the investigation of the causes of continuity and change.

Fourth, in relation to its objectives, not only does the study characterize mainstream methodology in the Ḥanafī school, but also it identifies and describes the few Ḥanafī jurists who did not follow this typical Ḥanafī approach.

Fifth, the framework-driven case studies lead to conclusions elaborated in the final three chapters that enrich some of the ways in which Islamic legal thought is normally understood. These address questions such as the relationship between laws and values, the dynamics and mechanics of legal change and continuity, the concrete ways such dynamics were manifested in Ḥanafī thought over the centuries, and the specific justificatory strategies that made continuity or change possible.

No contribution is without limitations. This book's results could be tested and refined by additional case studies. The conclusions about the role of social values could be further tested and enriched by research into extralegal literature. Important questions related to the case studies other than those treated in this work could certainly be investigated.

Outline of the Book

The first two chapters are introductory in nature. Chapter 1 introduces a general framework for the study of any legal tradition, Islamic or not. This framework underpins the subsequent historical case studies. Chapter 2 introduces, briefly, the Ḥanafī school of law and the legal subject matter of the case studies.

The next three chapters, Chapters 3 to 5, comprise the diachronic case studies at the heart of the book, treating certain laws concerning women and group prayer. They focus on legal reasons, their relationship to laws, and the question of continuity and change.

On the basis of these case studies the last three chapters, Chapters 6 to 8, address broad questions of philosophical and historical interest.

Chapter 6, "The Historical Development of Ḥanafī Reasoning," gives a brief description of the historical trajectory of Ḥanafī legal interpretation in light of the case studies. It describes how the expansion and shrinking of the corpus of binding texts impacted the laws – expansion in the aftermath of the rise of Ḥadīth-Folk ideology, and contraction in later centuries as some *ḥadīth*s that jurists had formerly relied upon were disqualified.

1

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.

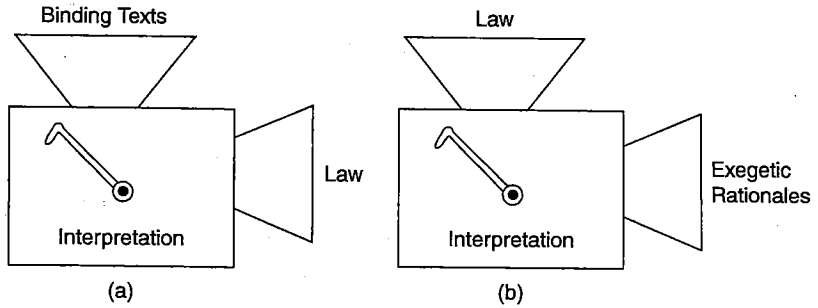

FIGURE 1. Two different conceptions of textual exegesis in legal interpretation.

(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

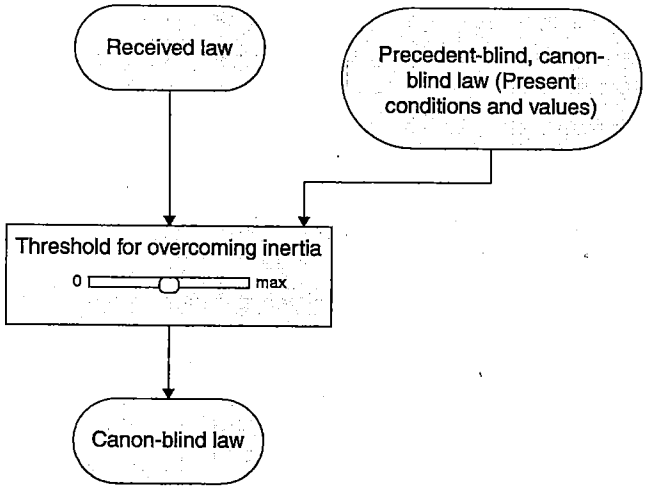

FIGURE 7. The factors shaping canon-blind law.

the heading *precedent-blind, canon-blind law*. More precisely, I define this term, counterfactually, as the legal position that a jurist would have advocated if he/she did not know the decision history *and* the canon. Equivalently, it is what the canon-blind law would be if the jurist did not know the decision history. Thus, the extent to which the canon-blind law differs from the precedent-blind, canon-blind law is a measure of the influence of received law: if canon-blind law is always the same as received law, then legal inertia is absolute, and present conditions, such as new social circumstances and current values, make no difference to the law. On the other hand, if the legal heritage and decision history is trumped by such current realities, then canon-blind law will be the same as precedent-blind, canon-blind law.

It is now possible to summarize, synthesize, and augment the key points by means of Figure 8, which puts the different pieces of the model together. In this schema, the law, or more precisely what a jurist decides the law ought to be, is the output. It is the outcome of the interaction between the canon-blind law and the canon as mediated by the jurist's hermeneutic-methodological approach. The schema, it should be stressed, portrays an individual's mind – the factors in the individual's mind that affect his or her decision. It does not model occurrences outside his or her mind. For example, the canon may have helped shape the decision history of the legal tradition; but this will not be reflected in the diagram since it

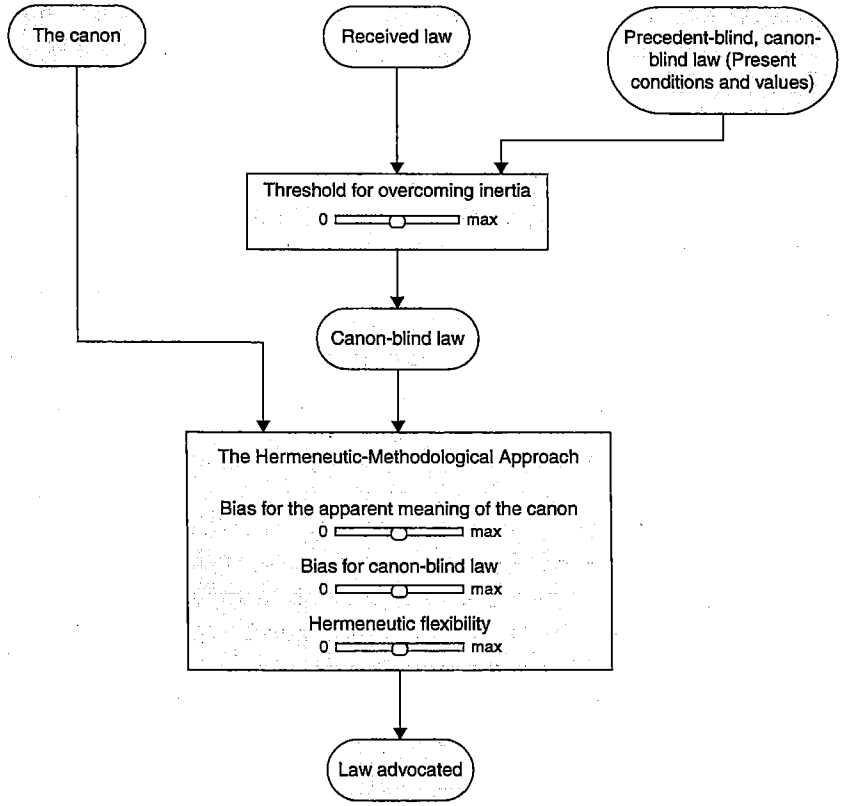

FIGURE 8. A general model of a jurist's decision making.

characterizes not the decision making of the jurist who is being modeled, but that of previous jurists.

I use canon-blind law as no less and no more than a shorthand for the following counterfactual definition: the law that the jurist would advocate if he/she did not take the canon into consideration in his/her deliberation. It is the outcome that would be arrived at without awareness of the canon – the decision that the jurist would reach if the memory of the canon were erased from his/her mind, by surgery as it were. Because jurists generally know the canon, canon-blind law is by definition a counterfactual concept. Nevertheless, often it can be inferred by studying the actual legal decision or the social context. For example, if the jurist's decision goes against the apparent meaning of the canon, in some circumstances that could be a sign that he/she would have reached the same

reliability of narrators, as indicated by a passage from al-Bazdawī's work on legal philosophy (*uṣūl*).[21] Four objections must be raised here. First, Abū Ḥanīfa and al-Shaybānī do not reveal doubts about authenticity. On the contrary, their language indicates that they take historical veracity for granted. For example, al-Shaybānī says that if a woman leads women, she should stand in their midst "as 'Ā'isha did." So, he does not betray any doubt about the authenticity of the report about 'Ā'isha, even though he does not recommend that women lead women. As another example, Abū Ḥanīfa acknowledges plainly that the Prophet allowed women to attend the *'Īd* prayers, and then adds "as for today, I dislike it." Secondly, it is probably anachronistic to portray Abū Ḥanīfa as an *isnād*-critic. For, notwithstanding an exceptional case such as al-Ṭaḥāwī, it would be several centuries before Ḥanafī jurists began concerning themselves with the qualities of the transmitters in the *isnād*s in a systematic manner.[22] Besides, Abū Ḥanīfa himself was not above giving *isnād*s that were incomplete or had "weak" links; and there is no evidence that he disapproved of anyone named in any of his own *isnād*s. Thirdly, after Ḥanafī jurists began paying attention to *isnād*s, some of them justified the school positions by openly endorsing the use of "weak" traditions, including those with unknown transmitters or missing links in the *isnād*s.[23] It is, therefore, misleading to point to the high standards of *ḥadīth* evaluation expounded in works of legal philosophy (*uṣūl*), such as that of al-Bazdawī, since these norms have little to do with jurists' actual use of *ḥadīth*s. Fourthly, some of the traditions that Abū Ḥanīfa and al-Shaybānī disregard are "sound" by the standards of the traditionists – thus, the Umm 'Aṭīya tradition made its way into the prestigious collections of al-Bukhārī and Muslim. No one really made an issue of their authenticity.[24]

[21] Muḥammad Abū Zahra, *Abū Ḥanīfa* (Cairo: Dār al-Fikr al-'Arabī, 1366), 291–2, 277.

[22] Al-Kīrawānī has, conveniently for my purposes, collected reports in support of his view that Abū Ḥanīfa was a *ḥadīth* critic. Most of these are anecdotes generated to prove that Abū Ḥanīfa's theology was sound; to show, for example, that he was not a *murjī'ī*, which he was. See al-Kīrawānī, *Abū Ḥanīfa wa-aṣḥābuh* (Beirut: Dār al-Fikr al-'Arabī, 1989), 57–62. For how such reports were generated in order to counter accusations against Abū Ḥanīfa, see, for example, Melchert, *Formation*, 54–9. Only a few of the reports are *prima facie* legitimate evidence of Abū Ḥanīfa's *ḥadīth* criticism.

[23] See, e.g., the views cited by the nonjurist Ḥanafī al-Zabīdī, *'Uqūd al-jawāhir al-munīfa*, 1:22. Al-Zabīdī himself, though, expresses doubt that the Ḥanafīs have such a liberal attitude, but does not rule it out. *If* it is true that the Ḥanafīs use weak traditions, he offers, that only demonstrates their eagerness to use every last scrap of evidence that is potentially of Prophetic origin.

[24] Another modern portrayal of Abū Ḥanīfa that is similarly anachronistic is given in U. F. Abd-Allah, "Abū Ḥanīfa," *Encyclopaedia Iranica*.

6.2. The Shifting Canon: The Rise of Ḥadīth-Folk Ideology

Given that Ḥanafī law did not originate in the *Ḥadīth*, it is important to ask what became of the gap between the law and the *Ḥadīth* once the *Ḥadīth* were firmly incorporated in the canon. One has to explain how and to what degree the new emphasis on *ḥadīth*s affected the laws on the one hand and legal reasoning on the other hand. In particular, did Ḥanafī law yield to the laws apparently embodied in the *Ḥadīth*? To put it more precisely, did the triumph of the Ḥadīth Folk's ideology mean a hermeneutic-methodological approach with a greater bias for the apparent meaning of the canon?

The answer is negative. As my case studies confirm, one repeatedly encounters examples of the law proving impervious to the apparent import of the *Ḥadīth* and other contrary evidence. (The only possible exception encountered in this book was the permission for old women to attend nighttime prayers, a limited concession that was later abandoned.) As a matter of course, jurists interpreted the canon in light of canon-blind law rather than derive the law from the canon. They did this in good faith. It is not clear to what degree various jurists were conscious of this, but at least al-Karkhī (d. 340/952), who was the head of the Ḥanafīs in his time, seems quite aware of it. He wrote:[25]

> Any Qur'ānic verse that contradicts the position of our colleagues [Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī] is treated by means of abrogation or preponderance, and it is best that it be treated by means of harmonizing interpretation (*tuḥmal 'alā al-naskh aw 'alā al-tarjīḥ wa-al-awlā an tuḥmal 'alā al-ta'wīl min jihat al-tawfīq*) ... Any tradition contradicting the position of our colleagues is treated by means of abrogation, or it is treated by [saying that] it contradicts another [report] like itself, so that [the two cancel each other out and] it comes down to some other evidence, or [by means of] preponderance ... or by means of harmonizing interpretation. This is done only on the basis of evidence.

As an additional case of how the *Ḥadīth* affected, or did not affect, the law it may be worthwhile to consider the reversal of the Ḥanafī acceptance of *nabīdh*, the potentially intoxicating beverages made from substances other than grapes. Ibrāhīm al-Nakha'ī and Abū Ḥanīfa had

[25] 'Ubayd Allāh b. al-Ḥusayn b. Dallāl al-Karkhī, *Risāla fī al-uṣūl allatī 'alayhā madār furū' al-Ḥanafiyya*, printed with 'Ubayd Allāh b. 'Umar b. 'Īsā al-Dabūsī, *Kitāb Ta'sīs al-naẓar* (Egypt: al-Maṭba'a al-Adabiyya, n.d.), 84. The term "preponderance" might refer to qualification or to declaring a report spurious if it contradicts another report. "Harmonizing interpretation" may take different forms, and qualification is one of them.

justify legal change is so flexible that it can be used by different jurists to argue for very different legal outcomes. Its inherent indeterminacy is a source of considerable hermeneutic flexibility.

He formulated the argument while taking the Qur'ān and the *Ḥadīth* to represent the canon; but it is equally applicable to the interpretation of the established school doctrine – and, indeed, Sirāj al-Dīn applied Ibn al-Humām's method precisely in this way. Thus, Ibn al-Humām's approach makes possible significant legal change within the framework of *taqlīd*, belying the commonly held notions that commitment to a school's doctrine stifles dynamism and that only by passing through the gate of *ijtihād* may the law be adapted to new circumstances.[39] It does not appear, however, that Ibn al-Humām's methodological approach was accepted by all, as Ibn Nujaym criticized it.[40]

[39] See Chapter 5, pages 125–6. The point about *taqlīd* has been made by Sherman Jackson, on whom see Chapter 5, page 125, footnote 37.

[40] See Chapter 5, page 125.

7

From Laws to Values

7.1. Introduction

One sometimes encounters the idea that Islamic law captures the spirit of Muslim civilization.[1] It is thus not entirely unexpected to find a scholar extracting sentences from the Qur'ān, *Ḥadīth*, or legal handbooks and thence deducing the Muslim perspective and character across time and space, without reference to the myriad interpretations and applications of these statements in specific, localized contexts.[2] Still more prevalent is the assumption that doctrines, interpretations, and ideologies – in a word, ideas – shape external reality to a far greater extent and in a more enduring

[1] For example, Joseph Schacht wrote, "Islamic law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself" (Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 28. For a critical discussion of the idea of a kernel, essence, or spirit animating Muslim civilization, see, for example, Chase Robinson, "Reconstructing Early Islam: Truth and Consequences," in *Method and Theory in the Study of Islamic Origins*, ed. Herbert Berg (Leiden: Brill, 2003), 104–8.

[2] It is, for example, in accordance with such an approach that a competent scholar provided a description of gender roles in "medieval Islamic societies" in just two pages in an account that presumably covers societies both urban and rural, settled and nomadic, from Spain to India. See Paula Sanders, "Gendering the Ungendered Body: Hermaphrodites in Medieval Islamic Law," in *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender*, ed. Nikki Keddie and Beth Baron (New Haven: Yale University Press, 1991), 74–95. By a coincidence, the article that comes immediately after this one in this collection of essays focuses on Cairo at a particular place and time and hints at a more complex picture of male-female interaction: Huda Lutfi, "Manners and Customs of Fourteenth-Century Cairene Women," 99–121.

fashion than social reality shapes or constrains ideas.[3] When seen in this light, Islamic law, as a set of ideas, functions not only as a mirror of society, but also as its genetic blueprint.

Clearly, there is much that can be debated here. Leaving aside the question of whether Islam (or any civilization or community) has an essence, there is the question of why legal literature should be said to reveal that essence rather than, say, historiography, a genre that is often equally imbued with a religious spirit but that sometimes exhibits views and attitudes that are different from those found in juristic discourse. Moreover, the causal relationship between social reality and ideas is a particularly difficult question that demands a complex explanation, and the view that ideas determine long-term social reality in predictable ways is unlikely to be a valid first approximation to such an explanation.

With such reservations in mind, prudent students of the legal handbooks (*fiqh* genre) may decide to settle for goals humbler than capturing the essence of Muslim societies. They may acknowledge that Islamic law has not been static. They may recognize that the norms laid down may not necessarily represent the practice, or may not have been applied always and everywhere. They may also concede that the values displayed by jurists would not have been necessarily shared by others in society. In other words, they may conservatively infer from the legal handbooks little beyond the values of jurists. But would one be finally safe if one narrowed the scope in this way? Can one infer from the laws at least the values of the jurists who wrote and defended them?

[3] Thus, for some authors, the Asha'arite doctrine of occasionalism explains why Muslims fell behind Europe in science. In my mind, any valid theory of the ultimate causes of this phenomenon will be framed primarily in terms of facts of economics, geography, and social organization, not of theology or philosophy, which can constitute at most *proximate* causes or correlates. (This is not to mention that occasionalism is not even relevant: since the time of David Hume, we have known that the notion of causes is not necessary for science.) The same methodological objection may be raised against authors who argue that the injunctions in the Qur'ān to think and reflect on nature are what brought about the impressive flowering of Islamic sciences and learning in the Middle Ages.

Similar approaches crop up in discussions about women. For example, in her early work, Leila Ahmed considered the injunctions of the Prophet Muḥammad and the Qur'ān as the direct cause of the low status of Muslim women throughout the centuries (Leila Ahmed, "Women and the Advent of Islam," *Signs* 2.4 (1986): 665–91). She distanced herself from that position in her later work. In contrast, some authors claim that Muslim women have had a relatively high status throughout history, attributing this again to the injunctions of the Prophet Muḥammad and the Qur'ān. Thus, these two opposite sides are united in their underlying assumptions regarding the causal relationship between the ideas promulgated by the Prophet Muḥammad and the long-term unfolding of Muslim history.

The thesis of this chapter is that, even within such a cautiously narrowed and modest purview, the inferential road from juristic literature to jurists' values and other aspects of social reality is littered with hazards. This is so because (1) jurists may valiantly defend a law even though they find the values underlying it alien or even abhorrent; (2) the reasons they give in favor of a law are often not the same as their motives for advocating it; (3) their claims about social reality may be factually incorrect pieces of speculation designed in good faith to achieve needed legal outcomes; and (4) they speak for the legal traditions to which they belong, which at times makes it difficult to determine their views as individuals. All of this is not to say that jurisprudence teaches nothing about social reality, and some of what can be learned is explored in Section 7.6.

These observations raise questions about the ways in which the legal handbooks are sometimes used. For example, the secondary literature on gender in Islam tends to approach this vast and sometimes difficult literature with a view to finding statements about women. Once such a statement is spotted, it is taken as representative of jurists' values and motives. In this process, usually no attempt is made to reconstruct the function of the statement within its legal-historical context. Yet failure to do so can be fatal to inferring values, since legal manuals reflect not just the values of jurists but also the constraints imposed by jurisprudence as a field with specific disciplinary norms and by law as a social phenomenon with dynamics of its own.

7.2. The Acceptability of Laws Birthed by Unacceptable Values

When jurists find a law intolerable, they tend to change it. So, it might appear at first sight that if they do not change a law, then they must find the values underlying that law acceptable – which should tell us something about their values. Such an inference, however, is not valid since it neglects the role of legal inertia. As a result, it misconstrues law as being necessarily the realization of an underlying set of ideas and values.

If jurists retain a law, the correct inference is that they find the law itself tolerable, but not necessarily the values that underpin it nor necessarily the values that generated it in the first place. That is so because finding a law tolerable is not always the same as finding the values underlying it tolerable. Those values people may reject while they live contentedly with the law itself. They may do so, for example, by reading new meanings and values into a law. Alternatively, they may maintain the law thanks to legal

to conform to what one may predict from legal theory, law appears to have a life of its own.

Law also has a mind of its own in the face of state ideology, ideology being another variable that is inadequate for explaining law. As can be recognized also in our own time, legal dynamics may be similar in countries ruled by diametrically opposed ideologies – which is not to say that ideology cannot shape or influence law. Setting aside special cases, Muslim countries ruled by Islamist elites (like Iran) and secular ones (like Egypt before 2012) are broadly similar in the way they relate to the premodern heritage: none have held on to the institution of slavery, almost all retain a premodern version of family law that has been modified to increase women's rights, and almost all have borrowed banking and commercial laws wholesale from some European country. This pattern is noteworthy given that many academics consider the restoration of old laws as the raison d'être of Islamism. The resilience of legal dynamics in the face of state ideology is illustrated starkly in the case of Iran. In the Islamic Revolution of 1979, its American-installed, relatively secular dictator was supplanted by an Islamist theocracy at loggerheads with the United States. After an initial period in which the revolutionaries abolished some of the liberalizing family-law reforms as part of their campaign to erase the vestiges of the regime they demonized, the Islamist government came to resume and indeed expand such reforms. Thus, the normal pattern in the modern Muslim world has been one of radical change in the laws of commerce and slavery and incremental evolution in family law, no doubt reflecting the different degrees to which different areas of the law have come into conflict with the new economic and social realities.[24] This pattern suggests that legal inertia is operative everywhere: the laws remain as they were, but may change when they clash with the new environment. Cases in which a Muslim country has departed from this pattern by abolishing Islamic law altogether have arisen only in the aftermath of war or revolution and have involved coercion by authoritarian ruling cliques or occupation by the Soviets.[25]

of California Press, 1992), 187–99; cf. Stanley Fish, "Play of Surfaces: Theory and the Law," in *Legal Hermeneutics: History, Theory, and Practice*, ed. Gregory Leyh (Berkeley: University of California Press, 1992), 297–9.

[24] By the word "evolution" I do not imply progress toward something better. Rather, I mean adapting to better fit the environment. I am drawing an analogy to biological evolution, in which clashes with environmental challenges favor the spread of fitness-enhancing adaptations. The evolutionary analogy is pursued further in Chapter 8, "The Logic of Law-Making."

[25] Kecia Ali has argued that it is not possible to change Islamic family law in a piecemeal fashion. Her argument is based on the assumption that the premodern laws were based on certain patriarchal models that Muslims today tend to find unacceptable, for example, models that analogized marriage to sale or slavery. It follows that Muslims cannot have it both ways: they cannot modify some of the laws while retaining others that were originally derived from those same now-objectionable values and models. Their only option is to give up the entire framework along with all of the laws that rest upon it. See Kecia Ali, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period" (PhD diss., Duke University, 2002), 477; Kecia Ali, *Sexual Ethics and Islam* (Oxford: Oneworld, 2006), 13; Kecia Ali, "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law," in *Progressive Muslims: On Justice, Gender and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), 180–3.

This argument is based on a misunderstanding of legal dynamics. Here I set aside Ali's problematic implicit assumption that the models premodern jurists cited in support of the laws had actually generated those laws. For the sake of argument, let us assume that they did. Equally problematically, she also assumes that the laws depend on the reasons given for them, so that if the legal reasons are delegitimized, then so are the laws. In reality, however, legal reasons have a secondary status compared to the laws: normally they adapt to accommodate the laws rather than the other way around. Case studies show that if a rationale is disqualified, the laws resting upon it do not necessarily fall. Jurists may tenaciously hold onto a law without accepting the rationales and values that were originally associated with it. In any case, the best proof for the proposition that Islamic family law can be modified in a piecemeal fashion is the fact that it has been modified in a piecemeal fashion in most Muslim countries. Piecemeal change has also been achieved in non-Muslim cultures that possess legal heritages that are no less patriarchal. Ali's paradigm thus fails to explain the empirical facts – facts that on the other hand fit well with the present book's conception of legal dynamics.

If legal dynamics are not fully reducible to ideology and culture, there ought to be instances of the same mechanism operating in different cultures and time periods, thus legitimizing comparative investigations. It may therefore be useful to consider analogues in other legal traditions to some of the processes found in Islamic jurisprudence. I have done so already in the discussion of legal inertia, defined as the tendency of the laws to endure. Now I would like to focus on processes of textual interpretation by noting some similarities in the ways in which the U.S. Constitution on the one hand and the Qur'ān and the *Ḥadīth* on the other hand are interpreted. Despite the use of the present tense, my focus is on the premodern postformative schools of Islamic law. I offer only a brief and preliminary attempt, though such comparisons could form the subject of many monographs. Six parallelisms may be mentioned:

1. The U.S. Constitution and the Qur'ān and *Ḥadīth* are texts, not a completely trivial commonality since historically not all legal traditions rely on texts.
2. Statements from the U.S. Constitution and the Qur'ān and some *ḥadīth*s are absolutely binding, unless amended (in the American