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A CRITICAL READING
OF
FAZLUR RAHMAN'S
ISLAMIC METHODOLOGY IN HISTORY:
THE CASE OF THE LIVING SUNNAH

Mohamed Shaid Mathee: MTHMOH001

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Supervisor: Dr. Ali Mabrook

COMPULSARY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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ABSTRACT

All Muslims agree that the *Sunnah*, is one of two major primary sources – second to the Qur’an - of their religious worldview and plays a fundamental role in the shaping of their civilization. *Sunnah* though needs to be qualified. Fazlur Raḥmān argues that what the first three generations of Muslims understood with *Sunnah* was the concept of *Sunnah* and not necessarily its content. This means that Muhammad was only the starting point for *Sunnah*, in other words his *Sunnah* is “the Ideal *Sunnah*” but he was in no way its seal in terms of its content. After his demise subsequent generations would continue to produce *Sunnah* through their interpretation and free-thinking activity under the aegis of the “Ideal *Sunnah*”. Raḥmān calls this the living *Sunnah*. However, later Muslims, for the last twelve centuries, have a different understanding of *Sunnah*. *Sunnah* has become synonymous with *ḥadīth* as it is found primarily in the six canonical works of *ḥadīth*. This change, Raḥmān argues, came about after Muḥammad b. ʿIḍrīs al-Shāfiʿī articulated his *bayān* scheme, which in a nutshell means that the entirety of law resides in two texts the Qurʾān and the *Sunnah* and that *Sunnah* is only the *Sunnah* of Muḥammad (concept and content). In search for uniformity and stability, Raḥmān claims, that Shāfiʿī destroyed the living *Sunnah* or more precisely the organic relationship between *Sunnah*, *ijtihād* (progressive interpretation) and *ijmāʿ*. But was this living *Sunnah* conceptually linked to the “Ideal *Sunnah*” of the Prophet? Why did Shāfiʿī decimate an entire tradition and what were his reasons and how did he do it? This thesis seeks to answer these questions by critically analyzing Raḥmān’s living *Sunnah* notion. On the other hand whilst it appreciates Shāfiʿī’s argument for the *Sunnah*, of the Prophet only, as the exclusive legislative supplement to the Qurʾān it problematizes how Shāfiʿī dealt with the materials from which he reconstructed (the content) the Prophetic *Sunnah* (as a concept).

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INTRODUCTION

The foundation of Islamic civilization was laid when Muḥammad b. ʿAbd-Allah proclaimed in *Ramaḍān* 609 C.E. that he had received the first revelation, which would continue over the next twenty-three years. Revelation is thus the pivotal dimension of the Islamic civilization; we can conclude that if not for revelation there would be no Islamic civilization.¹ That however does not mean that revelation, emanating from an extrahistorical transcendental source of a dissimilar nature, (*maṣḍar mufāriq*) and external as it were to the human being, alone contributed to the genesis and growth of the Islamic civilization. Rather it was the constant dialectical engagement of Muslims with their lived reality on the one hand, and their submission to and engagement of revelation on the other, that nurtured the Islamic civilization (Abū Zayd, 1994:9). According to Mabruk it was necessary for revelation, in order to remain relevant to the human reality and avoid stagnation, to be concretized in history (Mabruk, 2002: 78). Together with revelation Muḥammad's behaviour, (decisions, activities etc.), given his normative status known as the *Sunnah* make up the divine texts (*al-naṣṣ al-ʿilāhī*) that are preserved in human language. In short the Qurʾān and the *Sunnah* are - the - two primary texts of the Islamic civilization (*ḥaḍarah al-naṣṣ al-ʿilāhī*).²

¹ By civilization here I do not mean the existential aspect of civilization, in the sense that human beings are essentially civilized. From an Islamic religious position, there is only one true and correct civilization, which is the divine founded religion of Islam. Rather when I speak about civilization here, I refer to the making of many different civilizations within history characterized by its different and unique military, intellectual, economic, social, religious, cultural and political achievements, that which ʿIbn Khaldūn calls *ʿilm al-ʿumrān*.

² What I mean with *Sunnah* being revelation is that Muslims, especially after al-Shafī'i and the success of his *Bayan* scheme, came to see *Sunnah* itself as the revelation, albeit indirect, of God or what came to be known as *wahī ghayr matlu*. As for *Sunnah* as text I refer here to it being seen as synonymous with *hadith* (again after the triumph of the formal *Hadith* Movement) as compiled in canonical texts the most famous being what is called *al-sihah al-sittah* or the six primary works of *hadith* compilation.

During his lifetime, the Prophet was the sole religious and political guide for his community. The Qurʾān on two occasions mentions that Muḥammad would die and he himself mentioned this fact, on numerous occasions. Qurʾān 3: 144 states: “Muḥammad is but a Messenger; Messengers before him had come and gone. If he dies or is killed will you then turn back on your hills...?”

The Prophet’s death then meant the absence of the fountainhead of the civilization of revelation. With his death his religiously authoritative personal guidance was cut off. However the Qurʾān and his exemplary conduct embodied in the *Sunnah* remained for the eternal guidance of his community (Raḥmān, 1966: 43).

As a result of the Prophet’s death the *ʿummah* also now had to reconstitute itself as a post-prophetic, post-revelatory unit and to begin to work out its own destiny in the light of its understanding of the prophetic-revelatory event that was initially brought into being through the interpretation and implementation of the divine will. Their understanding of God’s activity, what is referred to as the “pre-theological” – did not solely focus on a scriptural revelation, but on a revelatory event in which a scriptural revelation was the principal, but not the only aspect of God’s revelatory activity (Graham, 1977: 11-19).

They had to interpret the Qurʾān and *Sunnah* and assign meaning to revelation since humankind, as the phenomenologists say, is a ‘meaning-giving transcendental subject’ (Dreyfus and Rabinow, 1982: xix). In doing so they had to ensure that the authenticity of these texts, that is their meanings, remain preserved, because by engaging the text

they were potential critics.³ At the same time the revelation had to remain relevant to the changing exigencies in terms of time and space. This process can essentially be traced back to two contesting trends.

The first trend is what Raḥmān calls the ‘living *Sunnah*’, which in his view represents the original and natural way of how the *Sunnah* was developed and preserved during the first century and a half of Islam.⁴ The Prophetic *Sunnah*, the “Ideal *Sunnah*” was only an ‘umbrella *concept*’ and the starting-point for its continuous interpretation that would continually add to the *content* of the *Sunnah*. The second trend was that of the formal *Ḥadīth* movement that saw the *Sunnah* as that which was found only in the traditions ascribed to the Prophet. Numerous compilations of *ḥadīth* texts in six famous works known as the Six Canonical Texts and other works came to be accepted as the authoritative depositories of the *Sunnah*. The idea that *Sunnah* equals *ḥadīth* then gained currency. Today most Muslims scholars and laity alike understand the *Sunnah* to be synonymous with the standard collections of *ḥadīth*.

This thesis critically engages the first trend. It attempts, in the first instance to ascertain whether the living *Sunnah* functioned within a coherent and consistent framework or as an undefined arbitrary exercise that lacked an intellectual, moral and scientific basis. In the second instance, it examines the extent to which activities and decisions of the living *Sunnah* might have been merely political decrees of the official political

³ The hermeneuticist E.D. Hirsch Jr. confirms this view in his notion that says, criticism must police its potentially anarchic details in order to secure the meaning of a text, divine or human thereby saving it from the ravages of history, for meaning remains constant (Eagleton, 1983: 67-68).

⁴ The early generations are the first three generations: the *Ṣaḥābah* (Companions), the *Tābi‘ūn* (Successors) and the *ʿAthbāʿ al-Tābi‘īn* (Successors to the Successors). It was with the birth and “triumph” of the formal *Ḥadīth* movement, according to Raḥmān, that the formative period of the early generations came to a halt. In addition to time, the demarcation between the first three generations and the ones that followed was the “demise” of the “living *Sunnah*” at the hands of the formal *Ḥadīth* movement.

authority and in general motivated by political activity in general by both the State and political opposition. A critique of the living *Sunnah*, essentially requires engaging Muḥammad b. ʿIḍrīs al-Shāfiʿī (d.204/820) though, for Raḥmān credits Shāfiʿī with the severing of the organic relationship between *Sunnah*, *ijtihād* and *ijmāʿ* and as such of the living *Sunnah*.

In my critique, I draw primarily on the ideas of two scholars. The first is that of ʿAlī Mabruk in his work *Al-Imāmah wa ʿl Siyāsah*. Mabruk argues that in order to understand the Islamic cultural legacy one must begin by deconstructing its epistemology – and by extension ontology – and find how it has hitherto been in the grip of politics and the political authority. This is Mabruk argues, fundamental for the effective interpretation of revelation, which is constantly reproduced in history. Interpretation must take place within an epistemological paradigm that is far removed from politics (Mabruk, 2002: 77).

The second scholar whose ideas I employ is Fazlur Raḥmān. In his book *Islam and Modernity* Raḥmān writes of Islam’s central doctrines: One-Creator-Sustainer God and an ethically based socio-political order. The Prophet, he contends, nurtured a deep God consciousness aimed at establishing essential human egalitarianism. The central concern of the Qurʾān is the conduct of humankind on this earth and that moral values cannot be made and unmade by man at his own whim and desires (Raḥmān, 1982: 13-19). In light of Raḥmān’s thought, which from the onset appears contradictory, the living *Sunnah* is found to be lacking of intellectual, moral and scientific character.

Summary of Chapters

In Chapter one I discuss and analyze the living *Sunnah* primarily in the context of, what Fazlur Raḥmān calls, the organic relationship between *Sunnah*, *ijtihād* and *ijmā*. I look specifically at concepts such as *ijmā*, *qiyās* and *ʿistiḥsān* showing that they were not coherently defined, and were employed arbitrarily, by the early generations. My argument is concretized by a reading of two important second century scholars and champions of the living *Sunnah* tradition namely Mālik b. Anas and ʿAbū Yūsuf.

In Chapter two I seek to prove my claim that the living *Sunnah* was in essence, though not exclusively, a political experience. Here like Raḥmān, I give vivid illustrations of examples of the living *Sunnah* and juxtapose them with examples that Raḥmān cites. By doing this, I hope to expose the incoherent structure, the arbitrary nature and essentially political disposition of the living *Sunnah*.

In Chapter three I interrogate the relationship between the scholars and the political authority of early Islam in order to assess which of the two exercised the greatest impact on the Islamic cultural legacy. I conclude that it was the political authority, albeit it not exclusively who did so. The scholars in turn, although independent, lived for most of the time in the shadow of the political authority. In short, I highlight the negative politicization of the Islamic cultural legacy's epistemology.

Chapter four critically discusses Shāfiʿī's *bayān* paradigm. I defend the central argument of the *bayān*: that the *Sunnah* of the Prophet is the exclusive legislative supplement to the Qurʾān. This argument thus in essence opposes the living *Sunnah*. I problematize Shāfiʿī's employment of hermeneutical rubric such as *ʿamm/khāṣṣ* and

naskh to identify contradictions in the *Sunnah* corpus as merely apparent contradictions. In other words I argue that Shāfi‘ī’s dictum that the *Sunnah* (its material content) of the Prophet does not under any circumstances contradict God’s Book is an arbitrary conclusion on his part in his endeavour to establish the *bayān* scheme.

This study then finds that the living *Sunnah* was an incoherent process that functioned arbitrarily and permeated with conflict. It bequeathed so many excesses that the move towards formalism was only a matter of time. It is under these circumstances that Shāfi‘ī appears and in an innovative and creative manner charts the path to stability and order.

University of Cape Town

CHAPTER ONE

The Living *Sunnah*

The life of the law has not been logic: it has been experience

Justice Oliver Wendell Holmes (Jackson, 2002: 177)

We are under the Constitution, but the constitution is what the judges say it is.

Justice Evans Hughes (Moosagie, u.p: 20)

1) *Sunnah* and Authority in Early Jurisprudence

Early jurisprudence refers primarily to juristic activity before Shāfi'ī's methodology, which, according to (Ḥallāq, 1997: 22-35; 1993: 587-591; Spector, 2002: 51-79) had little if any impact on juristic circles of his time or of the generation(s) that followed him throughout the ninth century (C.E.). Jurists who were contemporaries of Shāfi'ī as well those who came after him throughout the ninth century such as 'Ishāq b. Rāhaway (d. 238/853) did not adopt Shāfi'ī's methodology (Ḥallāq, 1997: 28; Spector, 2002: 55). For Shāfi'ī *Sunnah* meant the *Sunnah* of the Prophet, meaning that *Sunnah* was synonymous to the *Sunnah* of the Prophet (Schacht, 1979: 58).

This chapter is a critical reading of Fazlur Rahmān's living *Sunnah*, which he describes as the instrument by which the early generations of Muslims, through their free-thought activity, developed the Prophetic model into a definite code of human behaviour. I read the living *Sunnah* in light of Joseph Schacht's description of what he calls the *living tradition* outlined in his *The Origins of*

Muhammadan Jurisprudence. Schacht's living tradition is a nothing more than a scientific account filled with quantitative statements that describe the practices and legal opinions of the early generations.¹ It does not bid well to utilize it in some future project of reconstruction (Motzki, 2002: 40). This free exercise of opinion by the ancient schools' in the absence of a coherent framework Schacht calls the 'living tradition' whence from Rahman derived the notion of the lining *Sunnah*.

Schacht is perhaps the main source of Raḥmān's notion. His extensive and systematic work on *ḥadīth* of a legal nature provided Raḥmān with both the tools and material to conceptualise his own unique idea of *Sunnah*. Raḥmān though criticizes Western Islamic Studies for failing to distinguish between *Sunnah* as concept and *Sunnah* as content. Lammens and Margoliuth held that the *Sunnah* was entirely the continued work of the pre and post-Islamic Arabs (Raḥmān, 2000: 132). Schacht saw it as a relatively late post concept that referred initially to the ideal and evolved practice of the communities of Iraq, Madīnah and Syria expressed in the local doctrines and not yet exclusively embodied in traditions from the Prophet (Schacht, 1979). In Raḥmān's view it gives too simple an account of the situation and obscures an understanding of the early development

¹ This chapter – nor this thesis – will not investigate the veracity of Joseph Schacht's findings in his *The Origins of Muhammadan Jurisprudence*. However for an in depth account of Schacht's critics (those who engaged his results and the sources and methods he used), those who adopted his results without qualification, and those with reservations who have suggested modifications, see Harold Motzki's *The Origins of Islamic Jurisprudence Meccan Fiqh Before the Classical Schools* (English edition, 2002) pp. 36-49. People such as John Wansbrough have used Schacht's findings as their point of departure. See John Wansbrough's *Qur'anic Studies: Sources and Methods of Scriptural Interpretation* (1977). Recent years have seen the proliferation of works that are critiques and refutations – whatever their merits - of Schacht's conclusions on *Sunnah*, the development of Muslim jurisprudence, and his thesis on al-Shafī'i. See Muhammad al-'Azami's *On Schacht's Origins of Muhammadan Jurisprudence* (1985), Wael Hallaq's *A History of Islamic Legal Theories* (1997) as well as Motzki's *Origins*. Specifically written as a refutation of Schacht's *Origins* is Muhammad 'Azami's *On Schacht's Origins of Muhammadan Jurisprudence* (1985).

of Islam. My analysis, which is limited to Raḥmān's study focuses upon, what Raḥmān calls, the organic relationship between *Sunnah* 'ijtihād and *ijmā'*, which defined his living *Sunnah* conceptually and methodologically.

Raḥmān's notion of living *Sunnah* is ideological. It describes the historical only in proportion to his conception of what *Sunnah* once was and more so what it ought to mean for the present and the future especially in relation to his endeavour, as a Muslim Modernist, to transform the intellectual tradition of Islam. Hence he employs Schacht's living tradition ideologically and presents an argument for contemporary progressive Islam while grappling with the current dominant conservative religious discourse. Motzki indicates that he defused Schacht's results interpretatively meaning that he reformulated it as his own interpretation (Motzki, 2002: 38-39). Here, it must be emphasised, that Raḥmān did not simply adopt Schacht's findings uncritically. It will be a mistake to conclude that he merely took Schacht as a source, used his methods, and employed his results.

Raḥmān is decidedly anti-Shāfi'ī and unashamedly pro-ancient schools and the early jurists. For him Shāfi'ī's project was necessarily retrogressive. In his quest for stability, he reversed the natural progressive order of the living *Sunnah* dealing a blow to creativity and originality. Schacht does no such thing. He is neither pro nor anti-Shāfi'ī's nor for that matter is he pro or anti-early jurists. He simply says that Shāfi'ī's carried Muhammadan jurisprudence to a degree of competence and mastery, acknowledged by Raḥmān, which had not been

achieved before without suggesting that this was necessarily a good or a bad thing.

2) Linguistic Meaning of Sunnah

Ibn Durayd states that the original meaning of the verb *sanna* is *ṣawwara* (*al-shayʿa*), which means to fashion or produce something as a model (Raḥmān, 1994: 2). If it is said that someone *sanna al-shayʿa yasunnhu sunnan*, it means he/she fashioned a thing (*ṣawwarahu*) and this thing is *masnūn* in other words *muṣawwar* (fashioned) (al-Zubaydī, u.d: 244). On one occasion the Prophet encouraged people to give charity to a man described as *qabīḥ al-sunnah* (literally ugly in his appearance); *sunnah* meaning *al-ṣūrah* that is picture or appearance (Ibn al-Manzūr, u.d: vol. 3: 2124-2125). Hence the verse in the Qurʾān that man is created from *ḥamaʿin masnūn*, *masnūn* meaning *muṣawwar*.

In addition to that the verb *sanna* thus denotes change meaning that something can be done for a special cause and is not applicable to another situation. Alternatively, it could have a certain meaning and when the reason behind that meaning dissipates the action adopted remains as a practice or norm to be emulated. In his *Mufradāt al-Qurʾān*, Rāghib al-ʿIṣfahānī describes *sunnān* as the plural of *Sunnah* meaning the way or the manner [to something]. The *Sunnah* of the Prophet was his way, which he affirmed as his example (al-ʿIṣfahānī, 1961: 245). *Sunnah* means, strictly speaking, nothing more than ‘precedent’, or ‘way of life’ (Schacht, 1979: 58) and the straight path ahead or the path without deviation (Raḥmān, 1994: 3). Thus, it essentially means the way of the earlier people that

became a path (*maslak*) for those who came after them. It is *al-tarīqah* (the way) and *al-sīrah* (the course) whether good or bad, beautiful or ugly. (al-Zubaydī, u.d: 244). It is in this sense that *Sunnah* is used in the following *ḥadīth*: “Whoever fashions (introduces) a good *Sunnah* will be rewarded...and whoever fashions (introduces) a bad *Sunnah complete ...*” (Rahmān, 1994: 3)

The path, trodden and changing, once fashioned as a model then as in the case of the Prophet becomes exemplary conduct finding its fulfillment in being followed. According to the *Mawrid*, *Sunnah* means norm, rule, custom, usage, tradition, law and line of conduct. In short then *Sunnah* in essence refers to two things: one, the fashioning of something and how it appears and two, a path (whether good or bad) that is to be followed.

3) Understanding and Usage of *Sunnah* by Early Muslims

The early generations regarded *Sunnah* as a behavioral term, meaning that as practice, it was not specific in content and that a particular practice need not have been from a specific authority like for example from the Prophet on order that it qualify as *Sunnah*. *Sunnah* referred to practices or theoretical positions attributed at times to the authority of the Prophet and sometimes to that of the Companions, the early Caliphs, and the Successors and their own scholarly utterances (Spectorsky, 2002: 55). Traditions from the Prophet were used on the same level as traditions from the Companions and Successors and interpreted in light of local practice and doctrine (Schacht, 1979: 3).

‘Uthmān b. ‘Afān (the third Caliph) in a conversation informs ‘Ibn ‘Umar that the rebels gave him the choice between stepping down and being killed. ‘Ibn ‘Umar advises him not to take off Allah’s garment (the Caliphate) for that will become [a] *Sunnah* and every time people detest their Caliph they will either depose or kill him (Al-Balādhirī, 1980: vol. 5, 76; Al-Rawāziq, 2003: 131). On asked whether a wife can be separated from a husband who is unable to maintain her ‘Ibn al-Musayyab replied yes as that was [a] *Sunnah* (al-Zuḥaylī, 1989: 513).²

The famous Traditionalist and prominent Medinese lawyer Muḥammad ‘ibn Shihāb al-Zuhrī (a Successor) on the testimony of women states: “The established *Sunnah* has been (*maḍat al-sunnatu*) that the testimony of women is not valid in *al-ḥudūd* (punitive crimes), marriage and divorce (al-Zuḥaylī, 1985, vol. 7: 74).³

Sunnah then during the early generations was used very generally without reference to a particular authority and was susceptible to continuous change. It was used to refer to a practice or tradition (*ḥadīth*) or a combination of both with the Prophet, a Companion, a Successor or a scholarly pronouncement as equivalent authorities like Mālik b Anas author of *al-Muwattaḥ* the earliest extant work on *Ḥadīth*

‘Ibn ‘Umar was thus cautioning ‘Uthmān from introducing a novel act, [a] *Sunnah* that was till then not *Sunnah*. ‘Ibn al-Musayyab does not specifically mention the Prophet as the source of the *Sunnah* in question here nor does he quote a particular tradition with its chain of narrators. Similarly al-Zuhrī was

² Wahbah al-Zuḥaylī – articulating the classical view of the formal *Hadith* movement – interprets ‘Ibn al-Musayyib’s reply “*Sunnah*” to Abū al-Zinād to mean the *Sunnah* of the Prophet [only] (ibid, 513).

possibly referring to the *Sunnah* as it was practiced without reference to a particular Tradition (of the Prophet). The Iraqi jurist ʿAbū Yūsuf charged the Ḥijāzī lawyers when asked for authoritative proof for their rulings simply replied that it was the established *Sunnah*; ʿAbū Yūsuf however does not regard it to be the *Sunnah* of the Prophet but in all probability the decision of a market tax collector or a tax collector in an outlying district (Shāfiʿī, 1983, vol.7: 353).

This activity of free interpretation however led to a divergence in views fraught with disagreement, conflict and ultimately chaos. ʿIbn al-Muqaffaʿ who was a sharp critic of this old idea of *Sunnah* advised the second ʿAbbāsīd Caliph al-Manṣūr (d. 158) that in the *absence* of an agreed-upon *Sunnah* of the Prophet, to review the different doctrines (of ancient schools and independent jurists), codify and enact his own decisions in the interest of uniformity, and declare it binding on all *qādis* (Lambton, 1981)⁴. He deplored the divergences in the jurisprudence that existed between the schools of law in the great cities such as Kūfa, Baṣrah and Ḥijāz.

4) The *Sunnah–Ijtihād and Ijmāʿ* Relationship

Jacques Derrida sought, through deconstruction, to show that first principles are products of particular system of meaning commonly defined by what they exclude and part of a sort of binary opposition. What Derrida aimed to point out is that one term in a binary opposition is subconsciously or implicitly assigned

³ In another transmission al-Zuhrī ascribes this *Sunnah* as the established practice since the time of the Prophet and the two Caliphs ʿAbū Bakr and ʿUmar after him (Al-Zuhayli, 1985, vol.6: 570).

dominance over the other (Mautner, 2002: 69). An example of such a first principle is a male- dominated society where man is the founding principle (the one assigned dominance) and woman the excluded opposite (Eagleton, 1983: 132). Applying this Derridian definition of binary oppositions can help us to understand both Raḥmān's living *Sunnah* notion and Shāfi'ī's notion of *Sunnah* - any one of the two can be taken to be the first principle and the other its excluded binary opposite in their undermining of each other - can help us to understand how both conceptualised *Sunnah*. For now I will discuss Raḥmān's notion of *Sunnah*. Shāfi'ī will be discussed in Chapter Four.

4.1) Raḥmān's 'Ideal *Sunnah*' Notion

The person of the Prophet undoubtedly constituted an authoritative figure, and his practice a *Sunnah* for the nascent Muslim community and all Muslims thereafter. As Raḥmān says there was undoubtedly the *Sunnah* of the Prophet (Raḥmān, 1994: 9). Raḥmān, however, distinguishes – and rightly so - between two meanings of *Sunnah*: one, *Sunnah* as *concept* a valid and operative concept from the very beginning of Islam, which has its starting point the Ideal *Sunnah* of the Prophet symbolized by what Weber, calls the charismatic authority of Muḥammad (Dabashi, 1989: 2). It was the actual life of the Prophet and the milieu in which he moved that gave coherence to and provided the central activity for the Qur'ān's intelligible teaching (Raḥmān, 2000: 154). And two *Sunnah* as *content*, which was the result of the freethinking activity of the early generations (Companions, Successors and the Successors of the Successors) although it too had its beginning in the Ideal *Sunnah* of the Prophet. The organic

relationship between the *Sunnah*, *ijtihād* and *ijmāʿ*, allowed *Sunnah* to grow, naturally, in content as a result of continuous interpretation (*ijtihād*) making it co-extensive with *ijmāʿ* (consensus). Raḥmān states:

... the *Sunnah* of the Prophet was a valid and operative concept from the very beginning of Islam and remained so throughout; that the *Sunnah*-content left by the Prophet was not very large in quantity and that it was not something meant to be absolutely specific; that the concept *Sunnah* after the time of the Prophet covered validly not only the *Sunnah* of the Prophet himself but also the interpretations of the Prophetic *Sunnah*; that the *Sunnah* in the last sense is co-extensive with the *ijmāʿ* of the community which is essentially an ever expanding process; and finally that after the mass-scale *Hadith* movement the organic relationship between the *Sunnah*, *ijtihād* and *ijmāʿ* was destroyed.

(Raḥmān, 1994: 6)

4.2) *Ijtihād*

Ijtihād is the second and arguably most important element in the relationship that Raḥmān designates as organic between *Sunnah*, *ijtihād* and *ijmāʿ*. *Ijtihād* for Raḥmān, was an active and independent factor not in any way akin to Shāfiʿī's conception of *ijtihād*. *Ijtihād* he argues was the necessary instrument whereby the early generations developed the Prophetic model into a definite and specific code of human behaviour hereby adding to its content (Raḥmān, 1994: 14). In this way *ijtihād* has its roots in the "Ideal *Sunnah*" and then adds to the content of the *Sunnah*. In that it was the instrument by which the demand for continuous fresh thinking was satisfied *ijtihād* engendered simultaneously tolerance and acceptance of diversity that crystallised into a phenomenon *ijmāʿ*, which in turn, became the stimulus for continuous *ijtihād*.

Rahmān's delineation, of an organic relationship between *Sunnah* (the Ideal Prophetic *Sunnah*) and *ijtihād* and *ijmā'* with *Sunnah* at the forefront for the continuous production of *Sunnah* (content), is a rather arbitrary presupposition and conjecture. That most of the *Sunnah*'s content was the result of the rational activities of the early Muslims, and not that of the Prophet, is evident from historical and literary analyses. However that it was conceptually attached to the "Ideal *Sunnah*" of the Prophet is an arbitrary claim that is not proven. This latter assertion is based on the following observations:

The 'living tradition' functioned in the absence of a sound and objectively justifiable juristic theory that led to a wide divergence in doctrine with hardly an agreement on a single point of law (ʿĀnṣārī, 1991: 495). These disagreements were not simple or trivial. They went at times to the very heart of fundamental moral and religious Islamic invariables, such as the five universals (*al-kullīyyāt al-khamsah*) regarding life, intellect, honour, wealth and religion.⁴ It is for this reason that ʿIbn al-Muqaffaʿ (d. 142) disparages *ra'y* as used in the ancient schools and advised the Caliph in the absence of an agreed-upon *Sunnah* to supersede and regulate it (Schacht, 1979: 103). As ʿIbn al-Muqaffaʿ states

And that which [requires the urgent attention of] the Prince of the Believers should look into is with regards to the divergence, between these two cities [Syria and ʿIrāq], other [great] cities and the periphery areas, on many issues to the extent that contradictory rulings have reached alarming proportions on matters of blood [law of retribution], sexual conduct privacy and property. Hence the spilling of blood...is considered permissible (*mubāḥ*) in Al-Hira but at the same time rendered unlawful

(*ḥarām*) in Kūfa and likewise there is divergence within Kūfa so that [something] will be declared lawful in one of its regions and forbidden in another region.

(ʿIbn al-Muqaffaʿ, u.d: 353).

As an arbitrary exercise that lacked uniformity and consistency, the living *Sunnah* had the propensity for producing retrogressive decisions to the same extent that it produced progressive ones. Jurists of a particular regional school displayed a marked intolerance towards jurists of another school; a living tradition pervaded by general hostility to disagreement.

The early *ijtihād* phenomenon is not clearly defined in its relationship to *Sunnah* it is definitely not well disposed towards disagreement that with time (the classical era) came to be located somewhere between a crude as opposed to the later strict *qiyās* and *istiḥsān* both which translate as arbitrary reasoning. For as Schacht says, all individual reasoning whether purely arbitrary and personal or inspired by an effort at consistency, started at vague beginnings (Schacht, 1979: 98).

4.2.1) *Ijtihād*: Lost Between *Qiyās* and *ʿIstiḥsān*

The *ijtihād* of the early generations was neither a defined concept nor a coherent practice. Their *ijtihād* was a fluctuation between *qiyās*, *istiḥsān* and *raʿy*. In a given situation they would apply *qiyās* yet in a situation of a similar nature they summarily abandon *qiyās* for *istiḥsān* or even for a solitary *ḥadīth* that in principal they reject. Schacht calls their *qiyās* crude *qiyās* – as opposed to strict well-defined *qiyās*, a later development. The ʿIrāqīs’ *qiyās*, it seems in given

cases, was originally arbitrary *ra'y* that was modified and fixed into crude analogy.

4.2.1.1) Between *Ijtihād* and *Qiyās*

The early generations' *ijtihād* was akin to crude *qiyās*; a corollary of *ijtihād* conducted in this manner was that it could be rejected as crudely as it was fixed. For example 'Abū Ḥanīfa discards (Raḥmān will call it situational interpretation) a Prophetic *ḥadīth* that allots two shares for a horse and only one for the rider (its owner) for participating in *jihād*. He does so on the basis of *qiyās* reasoning that it is, analogically, illogical that an animal receives a greater share a Muslim man and ruled that one share be allotted to the man and one for the horse. His student Abū Yūsuf rejects this crude *qiyās* arguing that 'Abū Ḥanīfa's *ra'y* cum *qiyās* that reduced the portion for the horse from two shares to one is equally objectionable because it ends up equating an animal to a Muslim. But even more indicative of an incoherent practice of *ijtihād* is 'Abū Yūsuf's adoption of the Prophetic solitary *ḥadīth* – thereby supporting the position of the Syrian al-'Awzā'ī whom 'Abū Yūsuf usually vehemently differs with. As Schacht says this is a case of refined reasoning that led to the rejection of a crude *qiyās* (Schacht, 1979: 109).

Here I am not arguing that the early generations' *qiyās* was not that of Shāfi'ī, rather I wish to point out that their *qiyās* was not coherently defined and moreover that they were erratic in their practice of that very *qiyās*. Their *qiyās* was more akin to *ra'y* that was originally the result of the arbitrary and personal decision of the magistrate or the specialist. With *ra'y* we mean the arbitrary

opinions of the jurists reached, not only, outside the matrix of revealed texts but in the absence of a coherent legal theory concept.

4.2.1.2) Between *Ijtihād* and *ʿIstiḥsān*?

Mālik Ibn Anas is reported as having said: “*ʿIstiḥsān* is nine-tenths of [legal] knowledge” (al-Zuḥaylī, 1996, vol. 2: 735; ‘Abd Rabiḥī, 1980: 54-58). Al-Sarkhasī defines it as the abandonment of *qiyās* in consideration of what is easier for humankind (Goldziher, 1971: 12).⁵ *ʿIstiḥsān* was in reality just another kind of *raʿy*, opposed to *qiyās*. Goldziher thought of *ʿistiḥsān* as canceling the effect of *qiyās* to formally limit the indiscriminate application of *raʿy* (Goldziher, 1971: 12). On certain issues the ‘Iraqians opt for *ʿistiḥsān* yet quite arbitrarily abandons it for *qiyās* in a case of a similar nature (Schacht, 1979: 111). For example they, in deference to a tradition from ‘Umar, have several culprits executed for participating in the murder of one person (Al-Samāhī, 1996: 74). The ostensible reason is the consideration of public interest (preservation of life), and therefore they opt for *istiḥsān*. Yet, with regard to wounds (when several culprits only

⁵ We must point out though that any discussion on definitions of and differences between these concepts will necessarily place us within the classical post living *Sunnah* era that is removed from the formal period wherein our analysis is essentially located. However such a shift in location is necessary and helpful for one, a coherent critique of the early generations and the living *Sunnah* legacy, and two, to follow the change and evolution that concepts such as *qiyas* and *istihsan* had undergone from the formal period of the ancient schools to the classical period. Most, if not all, of these definitions of *istihsan* were coined during the later classical period under the aegis of *usul al-fiqh* as an organically structured and comprehensive methodology. *Usul al-fiqh* – the product of later scholars - according to Sherman Jackson came to operate as a means of imposing constraints on the creation of meaning - rather than as a mechanism for actually discovering it (Jackson, 2002: 1978). This means that during the early generations’ – before *usul al-fiqh* had taken shape - *qiyas* and *istihsan*, were rather unrestricted and undefined concepts, and it was only in the classical period that they became terms characterized by restriction in meaning when placed under the aegis of *usul al-fiqh*.

injure one person) they abandon it for *qiyās* as they apply the *lex talions* to only one culprit (the one who directly inflicted the wound) even though there were others who assisted him/her in injuring that person.

4.3) Ijmāʿ

Rahmān describes the *ijmāʿ* of the early schools as the product of diversity of opinion (*ijtihād*); a process marked by an informal and natural growth, which tolerated and demanded fresh thought that not only lived with but also upon a certain amount of disagreement that lead to a widening of the area of agreement and thus new *ijmāʿ* continuously. This account of *ijmāʿ* is rather superficial as *ijmāʿ* simply did not exist during that early era. At most there was consensus (*ijmāʿ*) on the essentials – on which no one held, or could hold, a divergent view. Difference of opinion on many issues were so pervasive that the word *ijmāʿ* was not even used.

In the 4th/10th century the phenomenon of textually different *ḥādīths* seen to possess a common theme known as *al-tawātur al-maʿnawī*, was introduced as a new concept in the methodology of *ḥadīth* classification (Ḥallāq, 1989: 80-81). In this manner *ijmāʿ* was officially granted religious authoritativeness by virtue of such a group of traditions - ascribed to the Prophet - with the common theme that the Muslim community will never agree on error; the very religious basis for *ijmāʿ*.⁶ Rahmān's claim that there was an informal *ijmāʿ*, a product of *ijtihād*, is simply not correct; *ijmāʿ* (formal or informal) did not exist. What did exist was the

ijtihād-Sunnah phenomenon whereby the Qur'an and Prophetic *Sunnah* were given to continuous interpretation, which then came to make up the much of the content of the *Sunnah*.

During the classical era *ijmāʿ* became a hermeneutical tool in order to deal with the huge corpus of contradictory and conflicting opinions of the early generations (the progressive *ijtihād* of the living *Sunnah*). As Goldziher said: "...we must consider...that with regard to the importance of *ijmāʿ*...the most contradictory opinions evolved" (Goldziher, 1971: 32). *Ijmāʿ* was employed hermeneutically by the scholars of the classical era as an ideological-political tool to secure religious immunity and acceptance for the arbitrary and contradictory opinions of the early generations especially the Companions.

5) The Early Jurists and the living *Sunnah*

The early jurists fall under the early, more precisely the first three, generations namely the Companions, the Successors and the Successors of the Successors. It was, specifically with the third generation that there was a proliferation of jurists (called the early jurists) who gained prominence, both, as individual and as members of the regional ancient schools. In this study we will critically analyse the role of two prominent third generation jurists that will give us a vivid picture of the living *Sunnah* and how it functioned. They are Mālik b. Anas (93 to 179) and ʿAbū Yūsuf Yaʿqub b. ʿIbrāhīm (112/ to 183). Both left works that survive to this day (Mālik b. Anas's *Muwaṭṭah* is the earliest surviving work on law/ *ḥadīth*) and they left an indelible mark on the Islamic legal-intellectual discourse acknowledged by all Muslims, scholars and laity alike.

5.1) Mālik ṢIbn Anas

Mālik b. Anas b. ṢAbī ṢĀmir from Yemenite origin was born in the year 93/713 in Madīnah. He spent his entire life there where he received his education. ṢIbn Qutaybah al-Dinawārī (d. 276) in his book *Al-MaṢārif* lists him among the scholars of high regard (ṢIbn Qutaybah, 1987: 277-280).

The Egyptian jurist and traditionalist Layth b. SaṢd rejected Mālik's call that all Muslims outside Madīnah ought to follow the lawyers and practice of Madinah and rejected several Madinan judgments (Dutton, 1996: vol. 3: 26). Layth argues that the Successors in Madinah after the Companions held contrary opinions on many issues. SaṢīd ṢIbn al-Musayyab and his contemporaries differed strongly among themselves and those who came after them differed even more.

5.1.1) Authority in Early Maliki Literature

Early Māliki legal literature was compiled from about a decade before the second half of the second century, beginning with the MuwaṢṢṭa, to round about the mid third century. An analysis of the MuwaṢṢṭa, the MuhktaṢar of ṢAbū MuṢṢab, al-MukhtaṢar al-Kabīr and al-MukhtaṢar al-ṢṢaghīr reveals the absence of a methodologically structured hierarchy of legal authority. It does not demonstrate a linear development in order of a theory of four sources of law but rather a dialectical development dependent upon the QurṢān, *Sunnah* and almost equivalently on the local doctrines and the opinions of individuals. This reality is a defining feature of the formal period when Islamic jurisprudence was

characterized by direct appeals to practical reason, i.e., *ra'y* as well as to custom that is local doctrine or practice that constituted part of the broader *Sunnah* (Fadel, 2002). As Brockopp says: “While some of these texts seem to privilege the Prophetic *Sunnah*, others depended on the juristic dicta of famous scholars. Still others made no explicit aim to authority. Each of these styles is the result of divergent conceptions of legal authority in this period” (Brockopp, 2002: 4-17).

5.1.2) The Case of *Radā'ah*(Breastfeeding)

A reading from *Kitāb al-Radā'* (the chapter on breast feeding) sheds light on Mālik's reference, to competing and multiple sources of authority in an equivalent manner (Mālik, 1985: 500-505).

Reference is made in an equivalent manner to Prophetic, Companion and Successor traditions *ḥadīths* as well as juristic opinions.⁷ Some of the Companion and Successor *ḥadīths* clearly contradict a Prophetic *ḥadīth* that states the marriage ban is established between a man who has reached the age of majority and the woman who breastfed him. Mālik narrates that the Prophet commanded Sahlah bint Suhayl to breastfeed Sālim, her husband's freed slave who reached the age of majority, a minimum course of five sucklings for the marriage ban to be established between her and Sālim. Mālik discards the Prophetic tradition in favour of one Companion *ḥadīthī* and 3 Successor *ḥadīths*, two by Sa'īd Ibn al-Musayyab and one by al-Zuhrī, which state that the marriage ban is established only if breastfeeding takes place in the first two years of the baby's life (*'illā mā*

⁷ Companions *Hadīth* mean in this case a statement of a Companion, specifically during the early generations when the saying of the Companions and the Prophet were accorded equal status.

kāna fī 'l ḥawlayni). Any breastfeeding beyond the age of two is considered as normal food eaten. Mālik echoes the opinions of the Companions and the Successors. In addition to that Sa'īd Ibn al-Musayyab, Zuhri and Mālik ruled that even one drop of milk (much or little) establishes the marriage ban again in clear contradiction to an alleged Qur'ānic verse (below) and Prophetic tradition that there must be a minimum of five sucklings.

This Mālik does after reporting a *ḥadīth* by 'Ā'isha stating that: “[It was] Revealed in the Qur'ān that ten attested breast-feedings establish the marriage ban. It was then replaced by five attested breast-feedings [establish the marriage ban], the Prophet died whilst it was still recited as Qur'ān” (Mālik, 1985:505). Mālik comments on this verse that 'Ā'isha reports on saying: “This is not what the practice [of Madīnah] is on (Mālik, 1985: 505). Yet acting on this supposed Qur'ānic verse and the Prophetic tradition 'Ā'isha *practice* was not to allow any man, who had not completed a minimum of five sucklings by her sister(s) or nieces (brothers daughters), ever to call upon her (Burton, 1990: 157).

'Ā'isha thus applied the Prophet's command to Sahlah to breastfeed Salim to all men. However the rest of the Prophet's wives - with the exception of Ḥafṣa - were of the opinion that this command of the Prophet was a special ruling (*rukḥṣah*) applicable only to Sālim.

There are two observations to be made. One, Mālik makes reference to more than one source – the Qur'ān , the Prophet, Companions, Successors and juristic dicta - that all enjoy equivalent religious authority. And two, Qur'ānic revelation and

Prophetic *Sunnah* are discarded in favour of the opinions of Companions, Successors and his opinion as a jurist.

Here Shāfi‘ī mounts a dual attack on the Mālikis firstly because they do not follow the *Sunnah* as established by traditions going back to the Prophet. A tradition from the Prophet, he held, must be accepted whether it is supported by the action of a Caliph or any other religious authority or not, for it derives its authority from itself that is by virtue of it coming from the Prophet and therefore any action contrary to a Prophetic tradition must be discarded. Secondly, and more importantly, they are inconsistent in their claim to practice, for whilst they give preference to practice (*‘amal*) over traditions they, however, do not abide to practice in a coherent manner and in fact abandoning practice. He says to them:

“So you relate in this book [the Muwaṭṭa’] an authentic, well-attested tradition from the Prophet and two traditions from ‘Umar and then diverge from them all and say that judgement is not given according to them and that the practice is not so, yet you do not report from anyone whom I know a statement to the contrary. Whose practice then do you have in mind when you disagree with the *Sunnah* of the Prophet which alone ought to be sufficient to refute that practice and [above that] you disagree with ‘Umar also...At the same time you fall back on practice, however we have not discovered to this very day what you mean by practice. Nor do I think we ever shall”

(Shāfi‘ī 1983, vol. 7: 244).

It is in reality the opinions of individual jurists that are called the practice and therefore there seems to be a continuous change in practice, because it is one more akin to personal opinion (*ra’y*) than to a collective one of all the Medinese. For example Shāfi‘ī points out that Mālik accepts a statement from al-Qāsim (a

Successor), above a Prophetic tradition, supposedly based on the practice of a group of people yet in other cases Mālik does not share the opinion of al-Qāsim and says he does not know who the ‘people’ are to whom al-Qāsim refers.

Modern scholars differ in their interpretations on Mālik’s - and earlier scholars’ attitude vis – à – vis traditions (*ḥadīth*) and practice (*‘amal*). Apologists (such as Ḥanṣārī) argue that the obvious reason, for the Medinese not accepting a Prophetic tradition was their fear that some Companion(s) might express an opposing opinion or act contrary to the tradition which casts doubt on the authenticity of the *ḥadīth* (Ḥanṣārī, 1991: 491). This is a stark assumption. If they were not convinced about the authenticity of a tradition from the Prophet then what would or could they be convinced about.

Admirers, of that early living tradition (especially the practice of Madīna), such as Yāsīn Dutton argue that the *Muwatta’* is essentially a book of *‘amal* or, more precisely a book of *ḥadīth* put into the context of *‘amal*. Mālik was not so much concerned with the formal report (*ḥadīth*) in proportion to his concern with the correct understanding of such reports – Ḥanṣārī reportedly said that *ḥadīths* are a source of misguidance (*maḍilla*) except for the *fuqahā’* (Dutton, 1996: 28). Both accuracy of transmission and accurate understanding of the material were of vital importance, hence Ḥanṣārī’s description of Mālik as Ḥanṣārī in *ḥadīth* and *Sunnah* thus delineating these as separate concepts. If therefore Mālik records a *ḥadīth* yet gives a judgement “seemingly” to the contrary we have to assume that he had a good reason to do so. That reason, according to Dutton, is that *‘amal*, for

Mālik, was stronger than *ḥadīth*; simply put *ʿamal* was a better indicator of *sunnah* than *ḥadīth* (Dutton, 1996: 33-37).

According to Dutton, this does not mean that *ʿamal* and *ḥadīth* are mutually exclusive, rather where they overlap as does happen they strongly confirm each other, but if there is a contradiction Mālik and the Medinese prefer *ʿamal* over *ḥadīth* even if the sources of the *ḥadīth* are completely trustworthy. Dutton's expose, though very important, tells less than what is hoped in order to understand this phenomenon of *ʿamal* vs. *ḥadīth* in the genesis of *Sunnah* and as Lowry (date) comments is a historical. The early generations preferred *ʿamal* above Prophetic traditions, not because practice was a more certain indicator of *Sunnah* than *ḥadīth* or that the spirit (*fiqh*) of these traditions – embodied by practice - mattered more. Rather their method was an inconsistent one as practice was many times based on the established opinions of individuals, especially the Caliphs and the governors in the provinces.

How then do we explain ʿĀʿisha's "practice" of sending Sālim to her sister ʿUmm Kulthūm to be breastfed as she did not allow any man to call upon her until he had completed a minimum of five sucklings – ten according to another contradictory report - by her sister(s) or nieces. ʿĀʿisha not only narrated this from the Prophet, but actually implemented it as practice; whether the Prophet's other wives disagreed was irrelevant. What is prominent in this practice was not necessarily widespread; it could equally have had been that of an individual.

Dutton's claim that Mālik was primarily more concerned with the *fiqh* of the *ḥadīth* is less than convincing. There was not, and need not be, necessarily an organic or natural link between the *fiqh* of the tradition and practice. But more importantly why the insistence by Mālik to record solitary traditions that were redundant and overshadowed by practice? Is it because these traditions were initially the rational opinions or interpretations of individuals whether on Qur'ānic verses or independent reasoning from the first two generations that did not become widespread practice (such as that of ʿĀ'isha) but had already by the second quarter of the second century or earlier been ascribed to the Prophet – Mālik started compiling the *Muwatta'* the late fourth decade of that century?

If this is so, it stands to reason, that an earlier practice was given preference over individual interpretations that later were afforded the status of reliable “Prophetic traditions” conveyed via trustworthy sources. Or is it that the opinion of a certain individual(s), managed, over and above a tradition of the Prophet – and a Companion or a Successor - to become the widespread practice? If it is so, what was the criterion for giving preference to the opinion of an individual Companion or Successor over an injunction of the Prophet, and for that particular individual opinion to become the practice? The reality is that there was no criterion. The living tradition exercise, as a whole, was inconsistent, arbitrary and political in other words on the level of state by the ruler as opposed to social on the level of individuals in society.⁸ It is precisely this lacunae and inconsistency that Shāfi'ī hoped to bridge with his project.

⁸ See Chapter Two on the lived reality as substantiation of this claim.

What is progressive of an opinion - if we accept that the breastfeeding tradition mentioned above was originally the interpretation of ʿĀʾisha – that hold that an adult man be suckled by a married woman? Indeed, what is rational, medically and socially, about it and more so how is it religiously sensitive especially in light of Islam’s strict rules regarding sexuality, chastity and its command to people to conceal their sexual parts (*sawʿāt*) from one another.

Mālik as a scrupulous and pious compiler of *ḥadīth* could not reject any tradition whose sources were completely trustworthy. By the time he was compiling the *Muwattaʿ* the *Ḥadīth* movement had already gained currency and increasing power over the living *Sunnah*. Mālik found himself unable not to record, for example the breastfeeding *ḥadīth*, ascribed to the Prophet, however illogical and contradictory it seemed to the Qurʾān, the practice of the community, other *ḥadīth* Arab custom, and basic common sense. It was not simply up to him, as an individual endowed with personal piety and a *fiqh* (correct understanding) of the traditions, to decide which traditions to record and which ones to discard. In principle, he was still committed to the rational living practice, but had to act within the boundaries of the prevalent political cum religious discourse with regard to the recording of “Prophetic” *ḥadīths*. It was a discourse that regarded the opinions, interpretations and actions of the Companions above reproach. Many of their views that had by the mid second century become “Prophetic traditions” could not be contested as possible fabrications. But Mālik finds an avenue of escape and that is whilst he records all these traditions he takes solace in the fact that it is practice that is given preference and followed.

My aim is not to demonstrate that Mālik was wrong - or right - in what he recorded in the *Muwattaʿ*, but to point out the inconsistency with regards to how at times *ḥadīth* is accepted to establish *Sunnah* and how at times it is summarily discarded. The same applies equally to practice. There was no criterion for accepting one practice over another practice in Madīna as there were at times several widespread practices that differed.

5.2) ʿAbū Yūsuf Yaʿqūb bin ʿIbrāhīm (d.183 A.H.)

ʿAbū Yūsuf was born in Kūfa in 113/731. He became the chief justice during the reign of Caliph al-Mahdī. He wrote *Kitāb al-Kharāj*, a compendium of religious laws dealing with questions on the conduct of the state and administering the empire at the request of Caliph Hārūn al-Rashīd (Lambton, 1981). His book contained the *Sunnahs* of the Prophet, the four Rightly Guided Caliphs, ʿUmar b. ʿAbd al-ʿAzīz, the Companions, of the various Umayyad Caliphs, and the interpretations of the jurists. As he states:

The Commander of the Faithful (May God strengthen him) asked me to compile an all-inclusive compendium dealing with the collection of land taxes (*jibāyā al-kharāj*), tithes (*al-ʿushūr*), religious-taxes (*al-ṣadaqāt*) and poll tax (*al-jawālī / jizyah*)

(ʿAbū Yūsuf, 1885:3)

5.2.1) Sunnah: Between Solitary Reports and Juristic Interpretation

By Sunnah ṢAbū Yūsuf means the well-known *Sunnah (al-Sunnah al-ma'rūfah)* that is the established religious practice even if a relevant tradition cannot be shown for it. As a proponent of *ra'y* he held that the qualified jurist well versed in law and possessed of a high degree of intelligence was allowed to freely develop the living *Sunnah* and contribute to its content through a situational treatment of the Prophetic *Sunnah*. For example he interprets the Prophet's treatment of the *Muhājirūn* in returning to them their properties after the conquest of Makkah as an exception to the *Sunnah* and therefore this practice does not constitute *Sunnah* (Rahmān, 1994: 13-29). He advocated the acceptance of only those *ḥadīths* that were well known by the legal experts known as the collective spirit or nature of *ḥadīth* and not solitary traditions, that is, a tradition transmitted by a single individual (*khabr al-ʿāḥād*). He rejected a solitary tradition as irregular (*shādh*) because it was not well known to the legal experts and thus in his view not in conformity with the Qur'an and the well-known *Sunnah* (Shāfi'ī, 1983, vol.7: 358).

The "rejection" of solitary *ḥadīths* must be placed in perspective. The general view held by modern scholars of Islamic studies – Western and Muslim – is that, prior to al-Shāfi'ī, solitary *ḥadīths (khabr al-ʿāḥād)* were frowned upon and generally rejected.⁹ This view must be rejected as it is at odds with the historical reality. The phenomenon, of referring to solitary *ḥadīths*, goes back to the earliest

times following the demise of the Prophet. Some Companions frequently cited solitary Prophetic *ḥadīths* –despite the reports that the first four Caliphs were very stringent in the spread of *ḥadīths* and demanded a witness when someone reported that the Prophet had something. ʾAbū Bakr himself – said to have burned 500 *ḥadīths* that he had heard from the Prophet indicative of his extreme caution rather his refusal to misrepresent the Prophet – cited solitary *ḥadīths*. For examples he alone reported that he heard the Prophet saying that the Prophets do not leave inheritance what they leave behind is for all the people. ʿUmar accepted a solitary *ḥadīth* by Subayʿah yet rejected a solitary one by Fāṭima bint Qays. ʿUthmān and ʿĀlī frequently referred to *ḥadīths* that, they alone heard from the Prophet. Thus solitary reports are not necessarily a 2nd century phenomenon and even less so opposed to, what Raḥmān and ʾAbū Yūsuf call, the well-known *Sunnah*. Rather I will venture to claim that the phenomenon of solitary reports precedes the reference to what became known as the well-known *Sunnah*, in seeking to substantiate legal and theological positions.

If we accept that many solitary *ḥadīths*, projected back to the Prophet, were in reality the legal and dogmatic views of first three generations arrived at through their free interpretation then it stands to reason, given the ancient schools' hostility to disagreement why solitary *ḥadīths* *ḥadīths* (*khābr al-ʾāḥād*) would be rejected. It was not so much the rejection of 'solitary' *ḥadīths* that may or may not have been uttered by the Prophet, as much as it was an aversion to disagreement. Hence Schacht's statement, that Shāfiʿī rightly connected the

⁹ With Muslim I mean scholars who are regarded as Modernists such as Rahman, Tasant etc. and with Western those scholars whom Rahman calls Western scholars of Islamic Studies such as Lammens etc.

rejection of 'isolated traditions' by the ancient schools with their aversion to disagreement is viable (Schacht, 1979). Specifically Ḥabū Yūsuf who does not reject "solitary" *ḥadīths* because it has only one chain of narrators, but because it stands alone as a kind of exception to the general *Sunnah*, which probably refers to the living practice of a particular school whether it can be traced back to the Prophet or the Companions or not.

Ḥabū Yūsuf's position is, however, not consistent. On the issue of the share (*sahm*) to be allotted to a Muslim for his horse for taking part in the *jihād* apart from his own share Ḥabū Yūsuf opted for a solitary *ḥadīth* literally without interpreting it situationally as he did on other occasions. Osman Tasant describes this shift as the reversal of the rational orientated position of Ḥabū Ḥanīfa symptomatic of 'Iraqi rationalism, to Shāfi'ite literalism (Tasant, u.d: 9-10). But was it a straightforward departure from rationalism to literalism as Tasant claims and from free human interpretation to the rigidity of text and obsession with legal fixity?

The living *Sunnah* was so permeated with incoherencies and contradictions that rigidity, as a solution to the problem would be the natural outcome. Tasant, as much, gives us an indication of this reversal of rationalism by Ḥabū Yūsuf. It was because of the relationship between law and politics, or that of law to politics. Ḥabū Yūsuf, unlike Ḥabū Ḥanīfa who was a fierce opponent of the Umayyad State and equally distanced from the Abbasids aligned himself with government efforts to codify the law and took responsibility for legal administration as a prominent scholar (Tasant, u.p: 5). Here we recall Ḥabū al-Muqaffa's advice to al-Manṣūr

very early in the life of the Abbasid State. 'Abū Yūsuf thus could not be as free as his teacher in exercising independent rationalism, free from state influence. The shift from rationalism gradually towards literalism was in essence a political one. And as Adonis says: "Every aspect of Arab life would be pivoted around the question of leadership and politics (Adonis, 1983: 2).

Conclusion

From all this we conclude that the living *Sunnah* did not function as a coherent exercise that would ensure order. Any viable system or theory that aims at progress and stability – without proscribing interpretation - where justice is pervasive must have a coherent edifice and stable structure. As John Rawls argues: "A good theory of justice would explicate and systemize our intuitive sense of justice in the way that logic spells out our sense of validity..." (Kukathas and Pettit, 1990: 7). It is precisely in this regard that the living *Sunnah* failed. It was characterized by a lack of order that allowed the same jurists to reject and accept solitary opinions; the "right" to free interpretation was limited to the regional (ancient) schools only. We saw Mālik's – and the Medinese school as a whole – view that all Muslims should follow the people of Madīnah. And we have seen how the situation being untenable as it was would play right into the hands of the political authority to move towards codification. It is here that Shāfi'ī appears and argues that the entirety of law as residing in two texts, the Qur'an and the *Sunnah*; *qiyās* or *'ijtihād* remains subordinate to these two sources (Lowry, up: 19-20). However to take the law from these two sources requires the human intellect.

CHAPTER TWO

The Living *Sunnah*: As Lived Reality

The best of you is my generation then those who follow them. ʿImrān b. Ḥuṣayn said: I do not know whether the *Nabī* said after this [initial] word twice or thrice – then after them [will come] people testifying whilst not asked to testify; they will betray and not be entrusted; they will make vows and not carry them out; and obesity will appear.

(Al-Bukhārī)

History is the key to the [Muslim] intellect and the [political] authority is the key to history.

(Yāsīn, 1998: 8)

In this Chapter I critically discuss the living *Sunnah* as an actual lived reality. This is done from two angles. One, from the perspective that the living *Sunnah* was shaped by politics and the political authority driven, many times, by motives not in line with the ethically based socio-political order of Islam, but in the service of personal, family and tribal interests. And two, its intellectual dimension that was arbitrary in nature and developed in the shadow of the political authority in a given historical milieu. Many religious dogmas and legal practices of that era were initially politically motivated and influenced – whether they were the decisions of the State or that of its political-religious antagonists. The scholars only followed later in justifying, modifying or refuting them. For example, David Powers points out a very direct and strong link between the laws on Inheritance and political succession with the *Shīʿa* (Powers, 1986: 113-114).

1) The Political Dimension

Raḥmān reads the first part of the *ḥadīth* (epigram) as a clear attempt to declare as religiously authoritative the results of the activity of these first three

generations, which is both intelligent and natural. The part from: “then falsehood will become rampant...” he describes, however, as a hopelessness that gave rise to “narrow religious” Messianism, which sees history as progressively deteriorating in order for a Messiah to come (Raḥmān, 1994: 111). Raḥmān misses the point completely. It was not Messianism at play, at least not as an intellectual and/or spiritual development but a conscious political endeavour to establish for the first three generations specifically the Companions an elite religious status and immunity for their legacy that was characterized by contradictions and interminable conflicts over power.

To critically evaluate the first three generations specifically the Companions, to subject their community to a social analysis, and to view their differences and clashes as human was not permissible; rather it became a religious anathema. Their contradictions were declared as mere differences of understanding and interpretation, all pervaded by “truth” (ʿAbū Zayd, 1994: 45). Reading them through usual human lenses meant questioning or even casting doubt on the very authenticity of Islam, as they were the embodiment of that very authenticity. Hence the binary; the demarcation between them and all future generations who could not possibly, as a religious truth, enjoy the same pious status. The natural result had to be the inevitable ever-descending retrogression – falsehood, betrayal, becoming fat (lazy), etc. of - future generations. In short this Messianism was essentially a political movement disguised, however, in pietistic religious language. Mabruk aptly asks why in the explanation of the genesis of Islamic thought only the religious element has been highlighted whilst the political element has been marginalized (Mabruk, 2002: 20). Raḥmān’s lament

has merit, but is historically misplaced. He embraces the poetics of the living *Sunnah* but shuns its politics completely.

By deconstructing that movement we find that it signifies a political notion that regards the fulfilment of the best, as a given, achieved in an exclusive historical era (first three generations) that would henceforth, automatically and as a necessity, lead only to a future that collapses.¹ Consider the view that with ‘Umar’s death nine tenths of knowledge “died” with him (‘Abd al-Rāziq, u.d: 154). The link between the political authority and history is crystallised in a symbiotic relationship, through which the one establishes, and is established by, the other (Mabrūk, 2002: 11). Understanding this symbiotic relationship is necessary to understand the genesis and development of law (*fiqh*) historically in the Islamic State for, as ‘Abd al-Jawād says:

The political authority has influentially performed a great deal in history whilst history impacted on the intellect directly and indirectly which resulted in the perpetual subjection of the Muslim intellect to both authority (by virtue of its history) and history (through its authority). The history of the authority caused this intellect to be almost completely obedient to government authority in the absolute sense whilst the authority of history – on this intellect – has bequeathed it a semi-complete submission – uncritically so to - the past in its absolute signification, as well

(Yāsīn, 1998: 8).

The Muslim intellect – religious and secular then lives and functions in what Fouad ‘Ajamī calls, “the Pharaoh’s shadow” (‘Ajamī, 1983: 12). Submission to

¹ This notion is in essence that of the ‘*Ash‘arī* political-historical religious discourse in terms of how it views the past and the future, as opposed to that of the *Mu‘tazilah* and the *Shī‘a* (Mabrūk, 2002: 11)

the political authority, the first condition for the practice of the law in Islam, is also the first step toward the complete renunciation of the self that one must achieve before reaching God (Massignon, 1982, 3:188). The relationship between *sharīʿah* (law) and *siyāsah* (politics) was that of dualism; of the two competing systems of law and jurisdiction. Never did *sharīʿah* solely guide; rather there was a judicial practice based on a variety of laws derived from, amongst others, the sovereign decision of a ruler (Masʿūd, u.p: 2-4). Law is shaped and influenced by politics in that the Caliph sees himself not only as the deputy of God on earth but also as the propounder of law in its widest sense (Ḥallāq, 1997: 10). Only later does law assume a normative status and presents itself as a partner in an attempt to direct the relationship aiming to reflect as much as possible the ideals of that particular message.

1.1) Politics before and at the time of Muhammad's Demise

The political situation, just before and at the time of Muhammad's demise, had a definitive bearing on the making of history – and by extension the Muslim intellect after his demise. A *ḥadīth* in al-Bukhārī highlights a major dispute that took place at the time of the Prophet's last sickness:

On the authority of ʿIbn ʿAbbās who said: "When the Prophet was on the point of death; his health deteriorating he said: 'Bring me writing materials and I shall dictate for you a document [of instructions] so that you will never go astray after it' ...ʿUmar said: "Pain has overcome the Messenger of God and the Book of God is sufficient for us." Some of those present ... differed with ʿUmar and a dispute arose ...[S]ome persons said: "Bring the writing materials ..." Others supported ʿUmar. When ... the squabbling increased the Messenger of God said: "Get up and leave me, there should be no quarrelling in my presence." ʿIbn ʿAbbās said: "It was indeed a calamity that they shouted and quarreled

preventing the Messenger of Allah from writing the document”. (Al-Bukhārī, 1982, vol 2: 1)

In the *Musnad* of Aḥmad ḥibn Ḥambal it is reported that a women said: “Beware the testament (*‘ahd*) of the Messenger of God” (Powers, 1986: 114; ḥibn Ḥambal, 1975: 754). A juxtaposed reading of the circumstances when ḥAbū Bakr dictated his political testament, to those when the Prophet asked for writing materials assuming that he wanted to dictate his political will reveals a serious discrepancy in the manner that both occasions, though quite similar, were dealt with.

ḥAbū Bakr called ‘Uthmān aside and said, “Write: ‘In the name of God, the Merciful the Compassionate’. This is what ḥAbū Bakr b. ḥAbī Qaḥafa bequeathed (*‘ahida ilā*) to the Muslims. As for, what follows.” [Muḥammad b. ḥIbrāhīm b. al-Ḥārith] said: Then [ḥAbū Bakr] fainted and [‘Uthmān] moved away from him. ‘Uthmān wrote, “As for what follows, I have appointed ‘Umar b. al-Khaṭṭāb as your Caliph, and there is none better for you than him.” Then ḥAbū Bakr regained consciousness and said, “Recite to me.” So he recited to him. ḥAbū Bakr said: “God is great!” and he said, “I think that you were afraid that the people would disagree had I died suddenly while unconscious.” [‘Uthmān] said, “Yes.”

(Al-Ṭabarī, 1884, vol. 3: 356)

Powers concludes that the similarities of both events lend support to the assumption that the Prophet sought to dictate a political testament in which he would nominate a successor (Powers, 1986: 115-119). Both the Prophet and ḥAbū Bakr were ill and on their death beds ḥAbū Bakr was literally out of his senses. ḥAbū Bakr used the term bequeathed (*‘ahida*)...” which reminds us of the unknown woman’s warning: “Beware the testament (*‘ahd*) – the term *‘ahd*, in

classical Arabic, is frequently used to denote a succession covenant - of the Messenger of God.” And ‘Abū Bakr’s words to ‘Uthmān “I think that you were afraid that the people would disagree had I died suddenly ...” echo the Prophet’s “Let me dictate ... so that no two men will disagree after me”.

Powers interprets those Companions’ refusal to provide the Prophet with writing materials as indicative of their suspicion and fear of the prospect that he was drawing up a last political will and testament with the specific aim of appointing a successor. Interestingly, ‘Ibn Ḥazm interprets the Prophet’s wish to dictate a document, which ‘Umar refused to grant him, as the Prophet’s intention to appoint, in writing, ‘Abū Bakr as his successor. Can we read this refusal to grant the Prophet his request as an example product of the progressive ‘living *Sunnah*’? Raḥmān’s notion is not – though it should be helpful in answering this question.

This underlying political character of events hitherto is affirmed after Muhammad’s death with the issue of his succession. No event in history has divided Islam more profoundly and durably than the succession to Muhammad which marked the first political rift that occurred in Islam (Tayob/ Mas‘ūdī, 1998: 43; Madelung, 1997:1). And as al-Shahrastānī said: “The greatest dispute (*khilāf*) between the ‘*ummah* [was] the dispute over political leadership (*‘imāmah*). For never has a sword in [the history of] Islam been unsheathed over a religious precept (*qā‘idah dīnīyah*) as it has been over leadership throughout all ages” (Al-Shahrastānī, u.d: 22). The possibility of conceptualizing the meaning of the succession of Muhammad appears quite difficult and unachievable except in light of the dispute and split that happened at the time (Mabrūk, 1993: 122). The early

Muslims debated and fought over who would become the repository of legitimate authority after the Prophet; there were several candidates: the Prophet's tribe Quraysh, his family, close friends and Companions, any ruler, regardless of how he came to power, and the Muslim community at large (Abou el Fadl, 2001: 12).² Only in the second century did the *sharī'ah* emerge, as constructed, articulated, and represented by a specialized body of jurists to harness all these arguments into a coherent and systematic discourse (Abou el-Fadl, 2001: 12).

2) The Demise of Muḥammad and the Living *Sunnah*

Immediately following the death of the Prophet, before his burial, the Companions in different groups met and exercised their interpretations as to what the nascent Muslim community had to do and how. The very first decision they took was at a gathering called Saqīfah Banī Sā'īdah.

2.1) Saqīfah Banī Sā'īdah: Election of the First Caliph

A detailed analysis of Saqīfah Banī Sā'īdah is of absolute importance, because not only was it the first event where the *ummah* – the 'Anṣār and three of the Muhājirūn– met and took a decision following the demise of the Prophet, it was, in my view, *the* major event in Muslim history that influenced, more than any other event, future developments. There the first leader was chosen to lead the nascent post-prophetic *ummah*. The event itself was marked by controversy and it

² 'Abū Bakr was elected first, through a special paying of allegiance followed by a general one. He in turn appointed 'Umar to succeed him. On his deathbed, 'Umar, nominated a six-man council from which 'Uthmān was chosen. 'Alī was chosen by popular and mass decision. Mu'āwiyah assumed authority through military prowess (*ghalabah*) and then introduced dynastic rule when he appointed his son Yazīd to succeed him.

became a backdrop for suggesting how the question of political leadership might be viewed and resolved (Tayob, 1998: 29).

During ‘Umar’s last pilgrimage (23/644) a man approached him and asked him how he would respond to someone who said that upon ‘Umar’s death he would swear allegiance to so-and-so (*fulān*), as happened at Saqīfah. On returning to Medina, ‘Umar addressed the Companions of the Prophet on the question of succession, specifically referring to ‘Abū Bakr’s election at Saqīfah, saying:

It has reached me that one of you has said: By God if ‘Umar b.al-Khaṭṭāb was to die, I would swear allegiance to so-and-so. Let no one be seduced to saying: The oath of allegiance for ‘Abū Bakr was a *falta*, yet it succeeded. It was indeed so, but God has warded off its evil ... Whoever were to swear allegiance to any man without consultation (*mashwara*) among the Muslims, his oath of allegiance would be invalid and both of them would be subject to be killed. (Al-Ṭabarī, 1879: 445-446)

‘Umar’s appraisal of Saqīfah was that it was a necessary evil and that it was only divine intervention that saved it from being a down right disaster. ‘Umar seems to have had a propensity for evoking divine intervention when a rush decision was taken or when he hastily announced that he would do something but ended up not doing it. For example, he intended to disclose information regarding *al-kalāla* but the sudden appearance of a snake, he claimed, prevented him from doing so, which he interpreted as a sign of divine intervention (Powers, 1986: 38).

Therefore he rejected it as an acceptable model for choosing his successor after his death – or that of any future Caliph. The Saqīfah event compromised the institution of consultation (*shūrā*); however, it was a hasty – and necessary –

political decision in the midst of a crisis (Tayob, 1998: 43). The matter was not decided initially on the basis of an all-inclusive consultation (*shūrā*), consisting of all Muslims.

2.1.1) Various Claims for Leadership

The ḥAnṣār argued that they were the Helpers who gave refuge, assistance and military protection to the Prophet. They believed in Allah and His messenger, whereas his own people rejected him for thirteen years and only a few from his clan (Quraysh) believed in Allah (Mabrūk, 1993: 123). To Madelung, the ḥAnṣār only aimed at restoring control over their city and not aspiring to the leadership of the Muslim ḥummah as a whole, as they expected the Muhājirūn to return to Makkah after the Prophet's demise, having no longer any good reason to remain in Madinah (Madelung, 1997: 31). To Hishām Ju'ayt it was a tribal initiative; a separatist behaviour that did not take the ḥummah as a whole into consideration but only the ḥAws/Khazraj tribal binary and thus it aimed at avoiding Qurayshi hegemony (Ju'ayt, 1995: 34-35).

ḥAbū Bakr, on behalf of the Muhājirūn, argued that they were the first Muslims and hence people (ḥAnṣār) should follow them – to be second to them politically as they were second in embracing Islam. They are the clan of the Prophet, the most central among the Arabs in lineage and abode, and its lineage alone is found in all tribes (ḥIbn Qutayba, 1990: 23).

ḥAbū Bakr's argument in essence was based on tribalism and tribal power – Quraysh was the most powerful tribe – to win the day for his claim. The

reference to religion was purely strategic, as it could not count as a religious merit. As Dabshi says, 'Abū Bakr's election was legitimated by the tribal council at Saqīfah and by his prominence in the Quraysh tribe, and so his pious personality and close companionship to the Prophet played no significant role (Dabashi, 1989: 10). 'Umar was unapologetic: the political succession to Muḥammad was the right of Quraysh only; the 'Anṣār want to cut them off from their origin by usurping the decree to rule (Adonis, 1983: 120). Banū Hāshim represented by 'Alī, argued for the caliphate by virtue of not only being from Quraysh 'Abū Bakr's argument – but equally by virtue of belonging to the Prophet's household (*Ahl l-Bayt*), who has the first and greater right to the Messenger of Allah, in his life and death.

The choice, however, fell on those who exercised authority in the days before Islam. And as Max Weber says: "Authority will be called traditional if legitimacy is claimed for it and believed in by virtue of the sanctity of age-old rules and powers. The masters are designated according to traditional rules and are obeyed because of their traditional status" (Weber, 1978a: 67, Dabashi, 1989: 17). 'Abū Bakr and 'Umar were both ministers in the pre-Islam aristocratic government of Quraysh (Mabrūk, 1993: 127). The Meccan merchant class, anxious to resume what Weber called the routine economic life, was an important element of 'Abū Bakr's constituency (Dabashi, 1989: 4). 'Alī came from a clan that historically occupied the bottom step of the socio-economic ladder, hence his constituency was made up mostly of the socially marginalized, slaves, outsiders and exiles who had no social status in Meccan society, such as Salmān, 'Abū Dharr, etc.;

they were the ones who refused to pay allegiance to ʿAbū Bakr (Mabrūk, 1993: 128-135).

Saqīfah transcended its constituent personalities and their individual piety (the ʿAnṣār, ʿAbū Bakr, ʿUmar, etc.) as merely moments in the movement of history that in its completion represents a type of divergence from the overall aim of Islam (Mabrūk, 1993: 128). Henceforth the caliphate was decided on a variety of questionable ways that were all religiously legitimized later; personal nomination of one or a specific number of people, military power and hereditary rule, etc. were limited to certain clans in Quraysh such as the ʿUmayyads and ʿAbbāsids (Juʿayf: 1995: 37). Sunni Islam as a political doctrine came to be concerned less with the constitution of legitimate political authority than with the more or less indiscriminate recognition of the fact of political power (Crone and Cook, 1980:124). Power then, as Nietzsche said, is the pivotal aspect and the only real value for the advancement of life; every power draws its ultimate consequence at every moment (Makkreel, 1999: 560-562).³ The power of ideas is often understood not in terms of their moral force but just because of the advantages they seem to bestow on people regardless of their moral outlook, or even whether they have a moral outlook at all (Taylor, 1991: 20-21).

At Saqīfah, the tribe (*qabīlah*), with its emphasis on social status, lineage, group loyalty, and customs of implacable, reckless temper, was chosen over direction (*qiblah*), with its emphasis on belonging to a nation united in its belief in one God and human egalitarianism (Al-ʿAṭīyyah, 1999: vol.16: 88). Given the

³ Although Nietzsche was not speaking in this context of political power assumed through brute force or despotism – he was rather arguing against what he called Christianity’s slave morality – I think it is yet possible to apply his ideas on power and morality to the context of political leadership in the Muslim experience albeit, in a distorted manner.

profound influence of the intellectual upon the material, the Qurʾān sought very early on in its revelation to put an end to the cultural effect of the tribal system. What happened at Saqīfah, though, revived that very tribalism that became rooted in the cultural structures of Arab-Muslim societies, reflecting the propensity of Bedouinism to be reshaped within various and different contexts. *Qabīlah* is ultimately antithetical to *qiblah* (Dabashi, 1989: 76). For ʾIbn Khaldūn, Saqīfah was the manifestation of *ʿaṣabīyyah* (group loyalty) whereby only Quraysh could assume political – and as such religious power:

All religious laws must have purposes and significant meanings of their own ... If we, now, investigate the wisdom of Qurashite descent as a condition [of the imamate] ... [T]here must be a [public] interest which was the purpose behind making it into law. If we probe into the matter and analyze it we find that the [public] interest is nothing else but regard for the group loyalty (*al-ʿaṣabīyyah*) [Group loyalty] gives protection and helps people to press their claims. Its existence frees the incumbent in the position [of *ʾimām*] from opposition and division. The Muslim community accepts him ... Now the *Quraysh* were the outstanding, original and superior leaders of the Muḍar their number, their group loyalty, and their nobility gave them power over the rest of the Muḍar hence all other Arabs acknowledged that fact and submitted to their superiority. Had the rule been entrusted to anybody else, it may be expected that their opposition and refusal to submit would have broken the whole thing up.

(ʾIbn Khaldūn, 1988: 244-245)

Saqīfah, in our view, failed the moral imperative of *qiblah*. It compromised the egalitarian ideal of Islam, as a political event had profound religious implications historically. A long term religious implication was that ʾAbū Bakr's (as a Qurashite) election at Saqīfah, which was a response to a political reality (the ʾAnṣār secretly meeting to choose a leader), became a political concept (*mafḥūm*

siyāsīyun) – Ibn Khaldūn’s notion of *‘aṣabīyyah* – and finally a binding political-religious text (*naṣṣ siyāsīyun*) – that is a *ḥadīth* (Yāsīn, 1998: 323). Henceforth various radically different interpretations would qualify ‘Abū Bakr’s election at Saqīfah. For the Sunni orthodoxy represented by the prominent traditionist al-Bukhārī (d. 256), his selection was based on a religious judgement of the Prophet (Tayob, 1998: 48-54). Ḥasan al-Baṣrī (d. 110) places ‘Abū Bakr as the explicitly designated and indicated successor (*naṣṣ jalī wa ‘ishārah*) of the Prophet as he was the only witness to the *mi‘rāj* (Massignon, 1982, 3:193). On the other hand the historian al-Ṭabarī and Jahiz the literary figure show ‘Abū Bakr’s selection as a pragmatic, rational and political decision of innovative excellence (Tayob, 1998: 54).

3) Other Illustrations of the Living *Sunnah*: ‘Umar’s Reign

Subsequent to Saqīfah many other decisions of an essentially political character were taken that we could read and we ought to be able to read as products of the living *Sunnah* experience. Since Raḥmān only discusses decisions of ‘Umar (when he was Caliph) as illustrious examples of the living *Sunnah*, during the era of the Companions, I too will look at other decisions of ‘Umar only and critically evaluate them as illustrations of the living *Sunnah*. I will, though, discuss political examples of the living *Sunnah* from the era of the Successors. My aim is to read all these examples in the light of the Qur’ānic moral imperative that Raḥmān himself insists upon.

3.1) The Expulsion of Banū Najrān and Arab Identity

ʿUmar, in the interest of socio-economic justice, decided not to distribute the conquered lands of ʿIrāq among the Muslim soldiery, as some soldiers would have expected, in accordance with an old law of war and how the Prophet had distributed the booty during his lifetime. That was indeed a moral and progressive decision motivated by considerations of socio-economic justice.

How though should ʿUmar's forced removal of the Christian tribe Banū Najrān from their native land in Najrān be described (ʿAbū Yūsuf, 1885: 73)? In the first case he feared that such a move would displace and dispossess the original inhabitants as well as neglect the world population and future Muslim generations. What was the ostensible reason for the removal of Banū Najrān? Were they a threat to the security of Muslims? Unlikely so, and even if they were as ʿUmar apparently feared the Islamic state was at that stage firmly established and strong (Egypt, the Persian and Byzantine empires had just been, or were on the brink of being conquered).

The reality is that ʿUmar largely identified Islam with Arabs as the natural identity for the Arabs, and he wanted only one religion (ethnic identity) to prevail in the Arabian Peninsula. A singular ideological force born and bred by them in the Arabian Peninsula should unite the Arabs; that force was Islam. Banū Najrān refused to abandon their Christian faith. Whether they were removed because they refused to enter into Islam (the national religion of all Arabs) and were thus

sent to ‘Irāq, the land of the *‘ajam* (non-Arabs), is a matter of speculation.⁴ What does seem clear are two things: one, ‘Umar’s inconsistency in not wanting to displace people from their homeland (the case of ‘Irāq) whilst removing them from their home in another instance; and two, his decision to deport Banū Najrān was in essence driven by ethnic interests. It will now also make sense to suggest that another reason (not primary, yet significant) why ‘Umar refused to distribute the conquered lands of ‘Iraq among the soldiery, i.e. Arab soldiers, was that he feared that upon becoming land-settlers they would cease to be fighters and mix among the local non-Arab population.

A further indication of ‘Umar’s notion of Islam as essentially the national Arab identity is that when the Arab Christian tribe Banū Tighlab refused to discharge the poll-tax (*jizyah*) as *jizyah* on the grounds that it was a tax for the *‘ajam* (non-Arabs), he did not object. Rather, they were prepared to discharge *zakāh* – as the Arabs (Muslims) did – a suggestion ‘Umar refused, explaining that *zakāh* was a duty obligatory on Muslims only; however, he allowed them, on their suggestion, to discharge twice the amount that Muslims discharge for *zakāh*, in the name of *zakāh*, not in the name of *jizyah*. Hence he commanded Ziyād b. Ḥuḍayr (a *zakāh* collector) to take double *zakāh* from Banū Taghlib, as they were Arab and not People of the Book even though they were Christian. In doing so ‘Umar emphasized Banū Taghlib’s Arab ethnicity, ignoring in the process their religious belonging – as he hoped perhaps someday they would become Muslim (the

⁴ In our current world, where experiences such as Apartheid rule in South Africa, the Zionist occupation of Palestine and its forced removals of Palestinians in 1948 with subsequent deportations of resistance figures, etc. are condemned as violations of human rights, how will the removal of Banū Najrān from their ancestral home be classified? How will it be regarded in light of what Raḥmān – and indeed all Muslims – believes to be the basic élan of the Qur’ān: the stress on socioeconomic justice and essential human egalitarianism (Raḥmān, 1982: 19).

natural Arab identity). He therefore stipulated that Banū Taghlib not let their children grow up as Christian – the natural assumption would be that these children would be Muslim, as the Arab identity demanded (ʿAbū Yūsuf, 1885: 135).

3.2) Six Cases of Social-Legal Legislation

ʿUmar proscribed the sale or gifting of *ʿumm walad* (a slave girl who bore her master a child) during the master’s life, and her retention as a slave after his death, and he laid down a strict code for the giving of testimony (Raḥmān, 1994: 179-188). These decrees were indeed progressive and moral; however, we juxtapose them to the following four decrees of ʿUmar in order to gauge their moral and progressive character.

One, his wish to proscribe women from attending congregational prayers at the mosque though the Prophet had said: “Do not prevent God’s female consorts from [attending] God’s mosques. Two, he alone was of the view (narrating a solitary *ḥadīth*) that stoning non-virgin adulterers to death was originally a verse in the Qurʾān. Interestingly, Raḥmān totally rejects stoning to death for adultery and refers to the seventh/thirteenth century scholar ʿIzz al-Dīn ʾibn ʿAbd al-Salām al-Sulāmī who apparently rejected it as well, declaring the entire traditional material on the issue utterly unreliable (Raḥmān, 1982: 30; al-Sulami, u.d: 149-163). Three, he banished Naṣr b. Ḥajjāj, said to have been a strikingly handsome young man, from his family home in Madīnah to Baṣrah; his reason, Naṣr’s handsomeness was an avenue of seduction (*fitnah*) for the women of Madīnah (Sharaf al-Dīn, 1980: 296). By banning Naṣr to Baṣrah did ʿUmar assume that his

handsomeness would not seduce the women of Baṣrah? And four, his decree to have the necks of the *ahl 'l dhimmah* (free non-Muslim subjects in the ancient Islamic state) stamped after the poll-tax has been taken and to force them to wear a separate dress to distinguish them from Muslims (such as placing a sash on their waist).

It is difficult to see how these four examples can be counted as progressive. But that is the living *Sunnah* exercise: undefined, incoherent (both progressive and retrogressive), arbitrary and enacted not organically but on the level of State.

4) The Successors: The Political Authority

The political authority during the era of the Successors played no less a significant role than the Four Rightly Guided Caliphs (*Al-Khulafā' al-Rāshidūn*) in the make up of the living *Sunnah*. In fact one can argue that their role was significantly greater than that of their earlier counterparts.

4.1) Umayyad Rule And Theistic Determination

Theistic predetermination was the official “religious” doctrine for the greater part of Umayyad rule. ‘Abd al-Mālik b. Marwān killed his designated successor ‘Amr b. Sa‘īd as per the decree of God. Diametrically opposed to this view was that of the scholar Ḥasan al-Baṣri’s in favour of human freedom (Raḥmān, 1966: 48). To Ḥasan the behaviour of the Prophet and his Companions’ behaviour although there was no actual transmission (*ḥadīth*) has shown to be that of human freedom. Because the living *Sunnah* was not defined, both Ḥasan and ‘Abd al-Mālik were

able to make their respective interpretations in favour or against human freedom. ‘Abd al-Mālik, in the absence of a *ḥadīth*, refuted - on the basis of *ra’y* Ḥasan’s view. When he asked Ḥasan for a transmission he was not in as much asking for a Tradition in proportion to him aiming at refuting al-Baṣri’s opinion on the basis of it lacking official religious sanction (a transmission); his point was that al-Baṣri’s interpretation had no preference over his. Needless to say that he could do that because he was the ruler and his view triumphed in the end.

And because there was no such literal tradition it was a mere matter of opinion, which only the political authority could decide on. And *ra’y*, as ‘Ibn al-Muqaffa‘ (d. 142) said, is the prerogative of the political authority alone (Lambton, 1981:52). Towards its end the Umayyad State radically shifts from theistic determination to human freedom at the hands of Yazīd III and Marwān II (the last Umayyad Caliph). Some of the early Mu‘tazilites (rationalists) were aligned to these Caliphs, just as they would become during the reigns the ‘Abbāsīd Caliphs al-Ma‘mūn, al-Mu‘taṣīm and al-Wāthiq (198/814 to 234/850). Why this turnabout? It seems that the Umayyad State could no longer depend on a political theology that allowed it to ascribe everything to divine determination. In our view, Raḥmān fails to comprehend that it was to a great extent – though not entirely political developments that motivated the interpretations of the early generations.

4.2) Abbasid Rule and Theocracy

‘Abū Ja‘far al-Manṣūr, the second Abbasid Caliph, held that God appointed him to rule. He exercises God’s authority over the people; he is the keeper (the lock)

of God's treasures and is responsible, with God's permission, for its distribution to the people. Through him God distributes abundantly, or holds back on, His treasurers (Mūsā, 1995:140). People, therefore, could not oppose or be critical of him. Al-Manṣūr, in coming to this position, depended on no *ḥadīth*; it was a rational decision – whether we think it progressive or not is beside the point - a political one that is; an undefined living *Sunnah* allowed him such interpretation. Once again he was the ruler.

5) The Intellectual Authority

Many of the early jurists, Raḥmān says, added, through progressive interpretation, to the richness of the content of *Sunnah*. However it needs to be pointed out that some of their interpretations were not purely intellectually inspired or organic. For example ṢAbū Yūsuf ruled, despite a direct Prophetic injunction that gold must be sold by weight (*wazn*) and not by measurement (*kayl*), that gold could be sold by measurement in accordance to the practice (*ʿurf*) of the merchants of his time. He allowed this because otherwise the prevailing commercial practice of paying for merchandise in the form of gold pieces would not be permitted, unless each gold piece was precisely weighed due to the disparity of weight found in many types of gold coins (Moosagie, u.p: 48-50). Two points need to be raised here: one, the disparity in the weight of many types of gold coins minted by different Sulṭāns is indicative of rival political forces as by minting their own coins, different in weight to that of others, they were entrenching their political authority economically; and two, the practice of the merchants was in response to political development and not as the result of a day-to-day market practice. ṢAbū Yūsuf, then, as the intellectual authority ruled

against the Prophetic injunction in an effort to rehabilitate a practice that arose not organically in society but as the decree of Sulṭāns.

Moosagie considers this as a striking example of the disparity between legal theory and practice, remarking that in orthodox legal theory there is no way to justify such a ruling that contradicts a conspicuous injunction based on *nass* (Moosagie, u.p: 50). Moosagie misses the point: firstly in ʿAbū Yūsuf’s time there was not as yet any coherent legal theory. Practice was the order of the day, but it was a practice marked by inconsistency and that governors and political authorities many times introduce. An incident from involving Muʿāwiyah b. ʿAbī Sufyān substantiates the point we trying to make. Shāfiʿī reports in the *Risālah*, that Muʿāwiyah sold a water bag made of gold or silver for more than its weight, ʿAbū Dardāʾ (a Companion of the Prophet) informed him that the Prophet forbade this kind of transaction. Muʿāwiyah replied that he saw no problem with the transaction. ʿAbū Dardāʾ protested against Muʿāwiyah, who in spite of being informed of the Prophet’s ruling follows his own opinion (Shāfiʿī, 1979: 98).

Conclusions

The aim of this chapter was to demonstrate that living *Sunnah* – in both its political and intellectual dimensions – was characterized by inconsistencies and a process that was essentially politically driven, both by the official State and its

political-intellectual opposition. True, the examples chosen were only a fraction of living *Sunnah* practice as it unfolded over that first three generations. However, they are sufficient, to give us a general and informed understanding of how the early generations especially the Companions crystallized their theological beliefs and legal practices. As for the claim of inconsistency it sought to critically question (or even cast doubt) on the progressiveness or rationality of some decisions. Here Raḥmān's description of Islam as an ethical order under *tawḥīd*, whereby morals could not be made and unmade at the will of man, was employed as a methodology to appraise these practices. Indeed there were examples that were progressive and truly revolutionary (for example, some of 'Umar's decisions), but it is precisely here that the paradox lies. For, whilst some decisions were characterized by progressiveness, in nature and content, some others were destructive from the onset and more so those that bequeathed a horrible legacy to future generations.

On accusing the living *Sunnah* of being in essence the product of political authority this chapter sought to highlight a stark omission, in Raḥmān's romantic account and as such his celebration of the living *Sunnah*, that is, the political element. In this regard I employed 'Alī Mabrūk's methodology to highlight exactly the primary role played by politics and its movement. So then what we lament is the total absence and lack of a coherent moral framework that would have enabled not only those very generations of the living *Sunnah* of the first one hundred and fifty years but also the subsequent ones, to deal with the discrepancies. In the absence of that moral-intellectual-scientific framework the political establishment ran amok at a pace with which the religious-intellectual establishment could not always keep up.

It is in this context that Muḥammad b. ʿIdrīs al-Shāfiʿī starts his program in search of uniformity and a methodologically defined law system. In the *Risālah* he, as Joseph Lowry argues, articulates the core idea of the *bayān*, which in summary means that the entirety of law resides in two texts, the Qurʾan and the *Sunnah*. Shāfiʿī attempts therein to set forth a comprehensive account of the nature and functioning of law (Lowry, u.p: 7-19).

University of Cape Town

CHAPTER THREE

Who's Authority: The Political or the Religious-Intellectual?

Obey God, obey the Messenger and the authority from amongst you (*uli al-amr*)
(Qurʾān 4:59)

God restrains through the ruler what he does not restrain through the Qurʾān.
(Al-Ṣaghīr, 1994: 154)

Islam has, undoubtedly, produced a great religious-cultural legacy and intellectual tradition. This chapter probes whether this legacy is, and to what extent, the construct of pure intellectual activity or that of political rule or of both – the two, in our view, are not necessarily mutually exclusive practices.¹ In other words, to what extent does this legacy represent the Islamic epistemology that dictates that knowledge (the pre-requisite for any enlightened humanistic tradition) must be the product of revelation and the human intellect? With human intellect we mean the natural disposition (*tabfiṭrah*) and ability of the Muslim human being to realize through knowledge his or her existence ontologically and decide his or her destiny in line with the Islamic *weltanschauung*, without any outside and artificial imposition.

This question of whether it was the political authority (the rulers) or the intellectual-religious authority (the scholars) that impacted more decisively on the religious legacy, is indispensable and paramount. It allows and helps us to understand,

¹ There were rulers who possessed knowledge to qualify them as scholars. ‘Abd-Allah b. ‘Umar described ‘Abd al-Mālik b. Marwān as one of the most knowledgeable youth of Quraysh in *ḥadīth* and on the verdicts of the Companions (al-Suyūṭī, 1982: 254). Mālik b. Anas found ‘Abū Ja‘far al-Manṣūr the most learned on the biographies of the predecessors and the most knowledgeable on the consensus and differences of the earlier generations on the Qurʾān, *Sunnah* and juristic rulings ... (Ibn Qutaybah, 1990: 202).

throughout the ages, the dominant religious discourse specifically in the context of a diverse legacy bequeathed by the theological sects.

It is the contention of this chapter that it was essentially the political authority and its political practice – whether good or bad that impacted on the nascent religious discourse that emerged during the first centuries of Islam. What we had was a politicization of epistemological questions. In this chapter, I aim to demonstrate that the political authority played such a seminal – though not exclusive – role in a way that Muslim epistemology was somewhat distorted to become what we may call a *political episteme*, which has a rather pejorative connotation. However, this does not mean that the intellectual authority did not have or create its own sphere of influence. To conclude that the political rulers enjoyed exclusive authority because of their possession of powerful resources – military, finances, force etc. is problematic because it renders authority synonymous with force and possibly violence.

1) Authority

Hannah Arendt describes authority – in the context of other phenomena such as violence, force, power etc. – as the most elusive of these phenomena and therefore the most frequently abused. Authority, whether vested in persons, in offices, etc., means unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed (Arendt, 1969: 43-45). There is a difference between authority as an existential given and authority as brute force. Sherman Jackson states: “Authority ... refers to the ability to elicit obedience on the belief that the authority

figure has the right to be obeyed. Power ... relates to the ability to force obedience regardless of what is believed concerning the power-wielder's right to be obeyed ... there is an intimate association between power and authority, the relationship between the two being dialectical and often confluent" (Jackson, 1996: xxiv). The philosopher-sage, whilst not exercising political power in a temporal manner, nevertheless possesses authority to analyse, evaluate and develop a critical discourse capable of influencing and directing public opinion.

Khalid Abou el-Fadl distinguishes between two types of authority. One, where there is "an authority" that is able to persuade so that the one who accepts him or her as an authority does so with the trust that he or she can explain the reasoning behind a certain decision, analysis, utterance or instruction. And two, where there is a person (one who possesses authority) "in authority"; he or she resorts to coercion employing a variety of methods, in this context unbecoming, to effect compliance with his or her commands. In this case one who accepts authority will in reality effect a complete surrender of judgment to the one in authority which is in fact domination, and not authoritativeness, at play (Abou el-Fadl, 2001: 18-23).

1.1) The Scholar: Actual Possessor of Authority?

Plato was arguably the first ancient who articulated the ambition of the philosopher – the model human being; possessor of knowledge – to enjoy the exclusive possession of authority in exclusion of even the political man who simply wields authority by virtue of brute force. The ruler and planner of the Republic, Plato argued, must be a sage, a philosopher and a scholar (al-Şaghīr, 1994: 7). Knowledge is an absolute

requisite for the person who wishes to be a possessor of political authority. The just society vying for the virtuous city will never be realized unless ruled by kings becoming philosophers or men who are philosophers cum kings (Wolff, 1996: 74).

Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one ... cities will never have rest from their evils, - no, nor the human race ... and then only will our State have a possibility of life and behold the light of day. (Plato, 1941: 171-175)

ʿAbū Ḥāmid al-Ghazālī (d.1111) sees that politics are exercised by four classes, of which the intellectual polity (*al-hukama'*) is the third. The men of this class are the heirs of the prophets (the first class) and have jurisdiction over the thoughts of the privileged few, as opposed to the civil polity of the rulers (the second class) who enjoy jurisdiction over the actions, but not the thoughts, of the privileged few and the common folk (al-Ghazālī, 1962: 28). It was As ʿAbū ʿAswad al-Duʿalī who said that kings rule over people while scholars rule over kings (ʿIbn ʿAbd Rabiḥī 1940: 70).

Plato, though, came to realize that there is no guarantee that the philosopher-king will rule the world. For the greater part of human history it was the wielder of political power, obtained and sustained through brute force (*qīwwah al-taghallub*) that steered, decided the perimeters, and determined the pace of the relationship between the two “authorities”. Plato therefore hoped that the kings and princes of this world would have the spirit and power of philosophy or at least the wish to be philosophers. This is clearly evident in the relationship between his student Aristotle

and Alexander the Great of Macedonia, ruler of Greece. Alexander was not a philosopher but merely interested in, and a patron of, philosophy.

Behind all this discussion the crucial issue that remains to be asked of the Muslim experience is: Who practices authority over whom, in other words, who rules whom? Was it the scholar whose exercise of authority was the primary mover of events and developments in Muslim History, or was it the political ruler or perhaps both?

Muslim scholars have argued that the Qurʾān delineates the proper dynamics of authority. In this regard they have frequently invoked Qurʾān 4: 59, which states: “Obey God, obey the Messenger and the authority from amongst you (*ʿulī ʿl ʿamr*) ...” Obedience to God and the Prophet is clearly understood – although it seems to have become a clichéd belief, for in its application there seems to be an ambiguity precisely from the perspective of the political authority. As for who is meant by “the authority from amongst you”, the scope of obedience that an authority wields, and the extent of that authority in relation to that of God and the Prophet over it, has been a point of contention ever since. Scholars have for centuries grappled and still grapple with this issue.

The prodigious tradition of Qurʾānic exegesis (*ʿilm al-tafsīr*) is indeed a helpful but by no means exclusive starting point to explore what is meant by *ʿulī ʿl ʿamr*. Exegesis involves a focus on developing rules for deciphering the meaning of the text in its original time and place. But concomitant to exegesis is interpretation

(*taʿwīl*), a lively process, revolving around the Qurʾānic text, and of exploring the contemporaneous significance of the original meaning (Abou el-Fadl, 2001: 118).

A recurring interpretation is that *ʿulī ʿl ʿamr*. refers at the same time and equally to the rulers (*al-ʿumarāʾ*), the jurists (*al-fuqahāʾ*) and the commanders of military expeditions (*al-sarāyā*) during the life of the Prophet (al-Zamakhsharī, 1977, vol. 1: 535; al-Ṭabarī 1986: 150-154; al-Shawkānī, 1983: 481). The *ʿumarāʾ* because they exercise actual political power (*ahl ʿl yadd wa ʿl qudrah*) and the *ʿulamāʾ* because they give religious-intellectual guidance (*ahl ʿl ʿilm wa ʿl kalām*); therefore the people have entrusted them with the planning and running of their affairs and empowered them to issue commands and directives (al-Qāsimī, u.d, Vol. 5: 1340-1345). Thus from the Caliph to the administrator of public behaviour (*walī al-ḥisbah*), the commanders of the armies, the knowledgeable jurists and the (*ahl ʿl ḥill wa ʿl ʿaqd*) all are regarded as *ʿulī ʿl ʿamr* (ʿIbn ʿĀshūr, 1984: 97-98; al-ʿAlūsī, 1985, vol.5: 65-66; al-Shawkānī, 1983: 481).

Specifically with regard to the authority of scholars, three verses are often cited. The first rebukes the – in this verse, Jewish – scholars (*al-rabbānīyyūn* and *al-ʿaḥbār*) for not prohibiting people from uttering sin and devouring ill-gotten property. The second commands people to ask those with knowledge (*ahl ʿl dhikr*) – arguably the scholars - if they do not know. And the third exhorts people to refer the issue of fear and security back to the *ʿulī ʿl ʿamr*. For some exegetes and jurists only the scholars

are the *ʿulī ʿl ʿamr*, and not the rulers because they are mostly ignorant and of aggressive nature (al-Jaṣṣāṣ u.d, vol.2: 451-452; al-Alūsī, 1985, vol.5: 65-66).

Thus whilst authority in Islam rests ultimately with God (the Qurʾān) and the Prophet (the *Sunnah*), in a very real and immanent manner, it has come to be identified, progressively becoming exclusively so, primarily with the political authority and to some extent with the religious authority as “parallel” authorities. [that “parallel” authority is primarily represented] Having earned its religious legitimacy and reached its maturity in this vein, by the first three generations who came to be identified under the term “the pious predecessors” (*al-salaf al-ṣāliḥ*). This is a vague term which according to ʿAbd al-Jawād Yāsīn lacks accuracy and definition, and as an independent source of law could and in fact at times did contradict the *sharīʿah* (Yāsīn, 1998: 17).

ʿAlī b. ʿAbī Ṭālib’s answer to the *Khārijite* slogan “judgment is only for Allah”, as stated in the Qurʾān, sheds light on that reality. The Qurʾān, ʿAli said, is written in straight lines between two covers and it does not speak for itself but rather it is men who speak in its name; the Qurʾān needs interpreters and interpreters are men. With exegesis and interpretation, as Greifenhagen has shown in the dissemination of the Joseph story, the boundaries of meaning constructed by exegetes (*mufasirūn*) are ever again breached, allowing the “stuff” of the text to flow in other directions and to be constituted anew ideologically (Greifenhagen, u.p: 15-16). And, ideology, as Jameson said, is a “strategy of containment”, which allows what can be thought to seem internally coherent in its own terms, while repressing the unthinkable which

lies beyond its boundaries that is always ever again breached (Jameson, 1981: 53). That the *Sunnah* of the Prophet too would be open to interpretation – specifically from the political dimension – was a reality that cannot be disputed.

2) Relationship between the Scholar and the Ruler

There has always been in the history of Islam a relationship between the scholars and the rulers. Scholars, though, differed in their relationship with the political authority; a particular scholar would establish and conduct his relationship in accordance to his belief that he should and was able to advise the political ruler to rule in accordance with the laws of the *sharīʿah*. Those who associated with the Caliphs did not see themselves as betraying their trusts (al-Sabāʿī 1985: 213).² Ranging from unconditional support, to cautious collaboration, and finally to total antagonism we can broadly identify three strands of relationship between the scholars and the political authority from the replies of three scholars.

The replies of Mālik b. ʿAnas, ʿIbn Samʿān and ʿIbn ʿAbī Dhuʿayb, to a question from the Caliph ʿAbū Jaʿfar al-Manṣūr, reveal the radically different positions that the scholars had adopted vis-à-vis the political ruler. He asked them: “What kind of man (read political-religious leader) am I according to you; am I a just ruler or unjust?”

Mālik replied: “O Commander of the Faithful I beseech you by God and I plead to you through [the Prophet] Muhammad and by virtue of your kinship ties to him, to

² For example, al-Zuhrī, who’s piety and reliable knowledge of *hadith* was well-known, based his support for some of the official views of the Umayyad state in keeping with the spirit of Islam (Rahman, 1966: 49).

excuse me from speaking on this matter”. ʾIbn Samʿān replied: “You [O Commander of the Faithful] by God, are the best of men, you do the *hajj* (pilgrimage), you combat the enemy [of Islam], you secure the highways, you protect the weak from being devoured by the strong, through you religion is made firm and therefore you are the best of men and the most just of rulers.” Replied ʾIbn ʾAbī Dhuʾayb: “You (al-Manṣūr) are, by God, the worst person I know: you have selfishly appropriated the wealth of God and His Messenger; that is the wealth of the [Prophet’s] next of kin, orphans, the needy; you have destroyed the weak, exhausted the strong and seized their wealth; what then is your excuse the day when you face God?” (ʾIbn Qutayba, 1990, vol. 2: 196)

The three replies – explicitly and implicitly – reveal the scholars’ awareness that they were dealing with a power in authority that tolerated no dissension. It depended first and foremost on brute force, and on very little of anything else, least so on knowledge and wisdom that the scholars boasted. Mālik’s reply represents the position of most scholars throughout the ages even though they did not regard the State as just – al-Manṣūr’s straightforward question left no room for a nuanced answer; it is therefore not difficult to link Mālik’s “inability” to answer to his political appraisal of the State in that he nevertheless recognized its legitimacy and worked with it. ʾIbn Samʿān’s position whether born out of a desire to flatter, fear of death, religious conviction, or political judgment is that of a religious “authority” that had completely capitulated to the political authority; where the ruler is quasi similar to God. This notion of similarity implies a discrepancy between the rest of humanity and the dual “God-ruler political unity”.

Spinoza tells us that in times gone by: “ ... kings ... have often endeavoured to persuade the world that they had derived their origin from the immortal gods. If their subjects regarded them not as mortals like themselves, but as gods, they would more readily suffer themselves to be ruled, and prove more submissive in all things” (Spinoza, 1862: 291).³ Ibn ʿAbī Dhuʿayb’s position – the exception to the rule – is one that is characteristically confrontational and antagonistic.

The question then that arises is what was the extent of the scholar’s authority vis-à-vis the ruler and his power? Was he able to influence and direct religious and socio-political discourse in the public domain in a manner that the actual wielders of political power could not. The scholar undoubtedly possessed authority to critically evaluate both the state and society as well influence public opinion. It was not, however, authority that posed an immediate threat or was a rival power to the political ruler. Lacking the ability, resources and even the desire, it seems, to remove or replace the political authority they harnessed their authority in the religious-intellectual domain in a way that precluded any direct interference in, or contact with, the state. Al-Jabartī tells us that when the French occupation withdrew from Egypt in 1801, they wanted to hand over political authority to the *ʿulama*, who promptly refused (Crecelius, 1980: 49-70).

³ Muslim rulers off course never claimed that they were of divine descent. There was, however, a move towards a situation where rulers were increasingly seeing themselves as God’s representatives on earth, hence their dissimilarity to the rest of humanity. When Muʿāwiyah b. ʿAbī Sufyān appointed his son, Yazīd as his successor he declared that the *ʿumma* had no choice in the matter for it was decided by divine decree (ʿIbn Qutayba, 1990, vol. 1: 59). By the third century the ruler in his behaviour was compared to forces of nature such as gale force, floods, sandstorms etc (al-Ṣaghīr, 1994: 96-105).

It is particularly true that the stronger and more firmly established the political authority was, the weaker and more marginalized the religious-intellectual authority was in the general public sphere.⁴ As al-Ṣaghīr says, they reluctantly came to terms with the reality of the Prophetic tradition, that the Qurʾān and the political ruler will part ways and that when that happens they should not abandon the Qurʾān (al-Ṣaghīr, 1994: 154). Academic and religious discourses, whether legal, theological, mystic or philosophical, were many times in response to the behaviour and actions of the political authority and not natural scholarship. It reminds us of Marx's comment that hitherto philosophers have only been interpreting the world when they should be transforming it. As Thomas Hobbes said, in the final analysis, neither content nor even reasonableness can be said to provide the binding force behind law; it is not Wisdom (read knowledge of the scholars) but Authority (read political power of the rulers) that makes a law (Postema, 1987: 11).

Khālid Masʿūd points out that the relationship between *sharīʿah* (where the scholar is only allowed to interpret and explain) and *siyāsah* (where the ruler had the sole "right" to initiate and legislate) was that of dualism of two competing systems of law and jurisdiction. Never did *sharīʿah* solely guide; rather there was a judicial practice based on a variety of laws derived from, amongst others, the sovereign decision of a ruler (Masʿūd, u.p: 2-4). Ibn Khaldūn explains the usefulness of the pen in the

⁴ For example, Moosagie shows that in the Indian subcontinent, the *ʿulamāʾ* acquired independent and genuine authority, and emerged as the formidable force (in the form of the religious seminary, Deoband) in Muslim socio-political life only after the collapse of the Muslim Mogul Empire in 1857 – Deoband was established in 1867 (Moosagie, u.p: 24).

acquisition, legitimation and preservation of power at different phases in the life of ruling dynasties:

It should be known that both “the sword” and the “the pen” are instruments for the ruler to use in his affairs ... at the beginning of the dynasty, so long as its people are occupied in establishing power, the need for the sword is greater than that for “the pen”. In that situation, “the pen” is merely a servant and agent of the ruler’s authority ... In mid-term of the dynasty, the ruler can to some degree dispense with “the sword”. In this situation the men of the pen have more authority ... [T]he pen is the instrument the ruler uses ... to supervise and administer his realm. (Ibn Khaldūn, 1958: 46-47)

Mabrūk interprets this Khaldunian justification of the priority of politics over knowledge as an entrenched perception that it is “the sword” that creates events and situations, whilst “the pen” only confirms, legitimizes and seeks to preserve the existing political authority (Mabrūk, 2002: 167). The pen, though independent, lives in the shadow of the sword in that it cannot – it does not seem to have done so in Muslim history – create or be the originator of an event; rather it seems to respond always to an already created situation. And therefore the scholars came to accept the “authority” of the sword once it had established its power. Did not Aḥmad b. Ḥanbal say that whoever, good or corrupt, comes to power through the sword has become the legitimate Caliph and is to be addressed as the Commander of the Faithful (Yāsīn, 1998: 336)?

This position or attitude of the *‘ulamā’* must, however, not be interpreted as a despondent or defeatist attitude simply because “politics” was out of bounds for

them. Jackson suggests that in reality it reflects the phenomenon of non-establishment *‘ulamā’*, meaning that this behaviour of apparently political passivism, or even insouciant attitude vis-à-vis politics at the top, was in no way so when it came to the *sharī‘ah* (Jackson, 1996: xxiii). The *‘ulamā’* created a separate space to function as independent authorities, alongside the State. Specifically during the early, extremely strong, Abbasid state the *‘ulamā’* knew all too well that they lacked the powerful resources – the military, finances, etc. that the State possessed and were thus unable to organize themselves in order to directly challenge the State.

From a Foucauldian angle on knowledge and power we can argue, of course, that the scholars did indeed have power. Specifically, because they are, according to a Prophetic saying, the heirs of the Prophets who inherit knowledge that is truth. And truth, as Foucault said, is not outside of power or lacking in power (Foucault, 1980: 131). The intellectual (as authority), he argued, can operate and struggle at the general level of that regime of truth, which is so essential to the structure and functioning of our society. The essential political problem for the intellectual is to ascertain the possibility of constituting a new politics of truth (Foucault, 1997: 42-43).

3) The Exercise of *Ra’y*: Between the Rulers and the Scholars?

Theoretically it was accepted that where the Qur’ān ic or the established Prophetic *Sunnah* gave explicit rulings the individual (ruler and scholar) or the community could not exercise independent reasoning – though for some it applied not to the political authority in practice and perhaps even in theory. On matters though that

neither the Qurʾān nor the *Sunnah* gave explicit guidance, independent reasoning (*raʾy* or *ʾijtihād*) was allowed. What, however, became a point of contention was who had the authority to exercise *ʾijtihād al-raʾy* - was it exclusive to that one party and what was the scope of that authority? The political-religious theories of ʾIbn al-Muqaffaʿ, the early jurists (such as Mālik, ʾAbū Yūsuf, etc.) and al-Shāfiʿī highlight the contradictory positions of the scholars regarding the issue of authority in the field of opinion (other than Qurʾān and *Sunnah*).

3.1) ʿAbd-Allah ʾIbn al-Muqaffaʿ

ʾIbn al-Muqaffaʿ (d. 142/756) was secretary in the late Umayyad and early Abbasid States. He came to full prominence during his tenure as advisor to (rather, political mentor of) the second Abbasid Caliph Abu Jaʿfar al-Manṣūr in the art of governance. In his treatise *Risālah al-Ṣaḥābah* he primarily addresses, and rejects, what he believed to be two extreme views regarding the Caliph's authority vis-à-vis *raʾy* (discretion) on the one hand and religious Texts (Qurʾān and *Sunnah*) on the other.

The first claimed that the Caliph had the right to obedience even if his commands were contrary to the laws of Allah. The second stated that no obedience is due to the Caliph if he commands with unrighteousness. He faulted the first view for its ambiguity in the application and scope of the Caliph's authority, in that it declared the Caliph to be obeyed under all circumstances. It is extremely harmful in that it weakens and disparages the obedience to the Caliph, to the extreme abomination of making permissible disobedience to God, explicitly and clearly. He rejected the

second view because it impedes, and makes light of, the obedience due to the Caliph by making it equal to any one who obeys Allah; if the *imam* is to be disobeyed when commanding with unrighteousness wrong and another person is to be obeyed for commanding with righteousness, then the *imam* (ruler) and this other (ruled subject) are equal in the right to be obeyed. This view, he says, is a path for the Devil to wrench obedience from the Caliph so that people will have no overseer in their affairs; a dangerous view, of course (Ibn al-Muqaffa', u.d: 348).

He then puts forward what he regards as an unambiguous (refuting the first extreme) and balanced view that clearly acknowledges the *ʿimām's* exclusive and unrivaled right to obedience in the field of *raʿy* (a rebuttal of the second extreme view), as follows:

As for our established position when the *ʿimām* is not to be obeyed in [his] disobedience to Allah, that applies in [case of] the obligatory acts (*ʿazāʾim al-farāʾiḍ*) and the penal code (*al-ḥudūd*) which Allah did not grant authority to anyone [to interfere with]. Thus should the *ʿimām* prohibit the [performing of the daily] prayers, the fast [of Ramadan], the pilgrimage, proscribe the penal laws [from being applied] and license what God has forbidden then no obedience is due to him – refutation of the first extreme view. As for our affirmation of the *ʿimām's* [exclusive right] to obedience, whereon no one besides him is to be obeyed, that is in [matters of] *raʿy* (opinion) and planning; the matter whose rein and firm grip Allah has entrusted to the authority of the *ʿimāms* only; no one [besides the *ʿimām*] possesses the command or [the right of] obedience with regard to [matters of] war,

the treasuries [of wealth], collecting and distribution [of taxes] ... and ruling [by his discretion in matters] with *ra'y* – refutation of the second extreme view on matters whereon there is no *athr* (precedent) [from the Qurʾān or *Sunnah*].

(ʿIbn al-Muqaffaʿ, u.d: 348-349)

Khālid Masʿūd explains ibn ʿIbn al-Muqaffaʿ s discourse in the context of the latter’s concern with the proliferation of conflicting judgments in courts due to the absence of an agreed-upon *Sunnah*. These conflicting judgments were caused by systematic reasoning that led to remote conclusions based neither on the Qurʾān nor on *Sunnah* that were acceptable to their authors only, hence the disagreements, at times, severely. *Ra'y*, in the absence of explicit rulings from the Qurʾān and *Sunnah*, was a matter of *siyāsah* (politics) that is good governance, the authority of, and to, which only the *ʿimām* possessed to give binding orders at his discretion (Masʿūd, u.d: 5).⁵ In this vein he brought what he regarded as a grave situation to the attention of the Caliph, saying:

And that which [requires the urgent attention of] the Prince of the Believers should look into is with regards to the divergence, between these two cities [Syria and ‘Irāq], other [great] cities and the periphery areas, on many issues to the extent that contradictory rulings have reached alarming proportions on matters of blood [law of retribution], sexual conduct, privacy and property. Hence the spilling of blood ... is considered permissible (*mubāh*) in Al-Hira but at the same time rendered unlawful

⁵ Others – including the *ʿulamāʾ* could only signal their opinion upon being consulted by, or respond to an invitation from, the Caliph (ʿIbn al-Muqaffaʿ, u.d: 350).

(*ḥarām*) in Kūfa and likewise there is divergence within Kūfa so that [something] will be declared lawful in one of its regions and forbidden in another region.

(ʿIbn al-Muqaffaʿ, u.d: 353).

Thus ʿIbn al-Muqaffaʿs work was a diagnosis of and remedy for the problems associated with the development of law (read, the living *Sunnah*). Contrary to this view, al-Ṣaghīr sees the *Risālah al-Ṣaḥābah* which he describes as an apparently administrative and organizational work, whilst its aim is ideological and political – as nothing less than an attempt to achieve for the political ruler a monopoly on opinion (*al-ʿistibdād bi ʿl raʿy*), which at the same time aims to confine the influence of the scholar. ʿIbn al-Muqaffaʿ strove to “free” the political authority from the notion of *ijmāʿ* that renders the opinion of the *ʿimām* and others (the scholars) equal (al-Ṣaghīr, 1994: 133-141).

In our view, al-Ṣaghīr reads too much of a political agenda in ʿIbn al-Muqaffaʿs treatise. It is true that his call for *raʿy* to be the exclusive prerogative of the Caliph was influenced by his special position as secretary of state. That, however, was not his sole *raison d’etre*, for as we saw above, he pointed out some serious discrepancies and contradictions that compromised fundamental Islamic invariables known as the five universals, namely life, intellect, honour, wealth and religion. Any scholar – irrespective of his political philosophy ought to be alarmed by such a situation, whether his motive was one of political expediency or genuinely in search of order.

Rather we find someone the stature of ʿAbū Ḥāmid al-Ghazālī, considered by al-Ṣaghīr as a scholar who represents the power of the intellectual authority, who wrote *Faḍāʾih al-Bāṭinīyyah* in the service of the Abbasid state, more specifically the Caliph al-Mustaẓhir who at the time had just become Caliph at the age of seventeen. Al-Ghazālī in fact states that the Caliph himself advised him to compile a refutation of the *Bāṭinīyyah*, exposing their innovations and falsehoods. The *Bāṭinīyyah* were at the time the greatest political threat to the Abbasid state. al-Ghazālī has two aims in writing this book: one, doctrinal (to expose the false doctrine of the *Bāṭinīyyah*) and two, political (to extol the virtues of al-Mustaẓhir).

A closer scrutiny, though, reveals that it was the political aim that qualified the doctrinal. The ostensible reason for which al-Ghazālī declares the *Bāṭinīyyah* as disbelievers is doctrinal; they confer on their ʿimām(s) divine qualities. Yet al-Ghazālī almost confers the very same qualities, albeit politically, onto al-Mustaẓhir in addressing the latter as *al-mawāqif al-sharīfah al-muqaddasah al-nabawīyyah al-ʿimāmīyyah* that is the noble, sacred, prophetic position and commandments of al-Mustaẓhir – the *Bāṭinīyyah* conferred the same terminology on their ʿimāms (al-Ghazālī, u.d: 2-3). Al-Ghazālī wrote this “doctrinal” treatise as a political service on the request of the state that needed the pen in combating its political, not doctrinal, enemy

It is also to be stated that ʿIbn al-Muqaffa^c was not a mere lackey of the political authority. The probable cause of his execution, at the young age of thirty-six, was his

writing up of a document procuring indemnity for ‘Abd-Allah b. ‘Alī, who had failed in his revolt against al-Manṣūr, and having Caliph al-Manṣūr agree to and sign the document. As Cook and Crone says, the Iranian noble, met his death under torture under orders from the very Caliph - for whom he according to al-Ṣaghīr aimed to achieve absolute obedience; he nursed his aristocratic ideals as secretary of a Caliph who could – and did – freely execute him at will (Cook and Crone, 1977: 102-104).

3.2) The Early Jurists

The early jurists – unlike ‘Ibn al-Muqaffa‘ regarded the exercise of *ra’y* accessible to both the scholars and the rulers. However, the arbitrary nature of the practice of *ra’y* within an incoherent structure of legal interpretation primarily allowed the political rulers to impose their opinions on all, under the pretext of preempting the proliferation of conflicting opinions, with negative consequences. There is no doubt that the scholars exercised independent reasoning and their opinions proliferated in the communities, but that was in situations that had no bearing upon the rule or position of the ruler, even where the latter might have contradicted the Qur’ān or *Sunnah* or sound opinion.⁶

For example al-Manṣūr’s influence pervades when he “advised” Mālik b. ‘Anas to compile a book (the *Muwatṭah*) with the following clear instructions: “[R]ecord,

⁶ We are reminded here of the saying of Mu‘āwiyah b. ‘Abi Sufyān, the first Umayyad Caliph, who said that he does not interfere in people’s talks – the scholars’ rational opinions and conversations, as long as they do not come between him and his rule, in other words, do not criticize his rule. As Thompson says, ideology operates through language and that language is a medium of social action (Thompson, 1984: 5).

from this knowledge, a book. Avoid therein the harsh views of ʿIbn ʿUmar, the lenient concessions of ʿIbn ʿAbbās, and the idiosyncrasies of ʿIbn Masʿūd. Tread the middle path ... so that we can coerce people, God-willingly, to adhere to the knowledge and your book [that you will compile]”. Mālik accepted the advice to compile the book, but he strongly declined that it be enforced as a uniform code for all Muslims, disseminated in all provinces, that judgement takes place in accordance to its knowledge-content only, and that it not be contradicted (Ibn Qutaybah, 1990, vol.2: 202).

Indeed Mālik’s refusal of the latter part of al-Manṣūr’s “advice” is praiseworthy; it is indicative of his commitment to free thought and his position that the exercise of opinion is the right of all. However, the mere fact that he firstly compiled it on the “advice” of al-Manṣūr, who then dictated the nature of the contents as well as that it should become a uniform code binding on all, is indicative of the reality – beyond Mālik that whenever the exercise of *raʾy* fell within the public sphere, then it was the exclusive prerogative of the political authority. Mālik’s refusal to have the *Muwaṭṭaʿah* enforced as a uniform code on all Muslims did not prevent ʿAbū Yūsuf, a rationalist like Mālik, from having *Kitāb al-Kharāj* (compiled on the request of Caliph Ḥarūn al-Rashīd) enforced (during Mālik’s lifetime) on all Muslims – ʿIbn al-Muqaffa’s recommendation to the ruler finally realised.

3.3) ʿAl-Shāfiʿī

First and foremost it must be made clear that Shāfiʿī, like the early jurists recognized the need for *ijtihād raʿy* (that I translate as “informed opinion”). In this respect, Ḥallāq and Lowry regard Shāfiʿī’s view that it is obligatory on a Muslim who is not in the vicinity of the *kaʿbah* to try and locate it serves as a kind of metaphor for legal interpretation in the search of God’s law. Just as, in the task to locate the direction of the *kaʿbah*, Muslims have been provided with stars, mountains, rivers, day and night as instruments of guidance, so they have in disclosing God’s law been provided with tools (Ḥallāq calls them textual indications and signs whilst Lowry calls them signs and minds). Ḥallāq says that Shāfiʿī’s analogy serves to show that just as two men may determine the location of the *kaʿbah* differently, so may two jurists arrive at different solutions to the same legal problem. This point reflects, in essence, Lowry’s statement that Shāfiʿī adhered to the notion of a metaphysically correct solution; the answer is somewhere. Shāfiʿī then maintains, that despite the possibility of error, *ijtihād* (exercise of regulated *raʿy*) should be undertaken, for abandoning it is tantamount to discarding prayers until there is certainty on the location of the *kaʿbah* – an argument which is plainly objectionable (Ḥallāq, 1997: 28-29; Lowry, u.d: 29). If this point is indicative of anything it is indicative of Shāfiʿī’s as a tolerant and realistic rationalist within the *bayān* matrix (the entirety of law resides in two texts, the Qurʾān and the *Sunnah*).

However, unlike the early jurists he regulates *raʿy* (to constrain legal interpretation) in the form of *qiyās*, as he does not assign it a role independent of and outside the

ambit of two revealed texts – the early jurists paid little attention to (Prophetic) *Sunnah*. Unlike the *ahl' l ḥadīth* who spurned *qiyās* (i.e. regulated *ra'y* for Shāfi'ī) all together, Shāfi'ī, as Ḥallāq says, is located, in both time and doctrine, midway between early *ra'y* libertinism and the later Zāhirite conservatism (Ḥallāq, 1997: 32).

Lowry describes Shāfi'ī as a metaphysical realist who held firmly that there is an objectively correct answer to legal questions in situations where there is no directly relevant text, hence the need for *ijtihād* (legal interpretation). In other words, the correct answer, in any instance that requires *ijtihād*, is not in any way dependent on human ability to be known; it is somewhere out there metaphysically and shows itself completely independent of human ability (Lowry, u.d: 329).

So if the person (ruler or scholar) who practices *ijtihād* (legal interpretation) in situations is not the issue at all, but rather objectively and metaphysically correct answers, then practice of opinion, within the ambit of the two texts, of course, is open to all, alike, provided that they operate within that ambit. This position, of course, contrasts starkly with that of Ibn al-Muqaffa', who saw *ijtihād* as being the exclusive domain of the political ruler. It also differs from the position of the early jurists whose arbitrary practice of *ra'y* that resulted in a proliferation of conflicting opinions provided the rulers with the opportunity to codify law under the pretext of bringing uniformity and order.

In that sense, in al-Ṣaghīr's view Shāfi'ī's thought was in essence political. His insistence on precision (*ḍabt*) of the perimeters of law codification, religious edicts,

(*fatāwā*) and commands salvaged it from a purely individualistic (read, subjective) character and imbue it with a spirit of inclusiveness (read, objectivity). This returns us to the verse (cited above) wherein the issue of *ṭāʿah* and its scope is dealt with. This verse and numerous Prophetic traditions were politically exploited to enforce absolute obedience for the ruler almost on equal par with obedience to God.

And this Shāfiʿī realized, hence his fundamental existential concern: to who is obedience due (*li mann takūnu al-ṭāʿah*)? Because the ruler possessed, more than anyone, the means to influence and coerce (the carrot and the stick) he was in the position to impose his opinion and force others to accept his “juristic” preference (*ʿistiḥsān*). Shāfiʿī’s “limitation of free speech and interpretation”, i.e. his anti-rationalism then provided in essence the theoretical basis - whether Shāfiʿī intended for it to be so or not - a restriction on the power (*yadd*) of the *sulṭān* who enjoyed, at least or should in the view of Ibn al-Muqaffaʿ, the exclusive right to the exercise of *rayʿ* (al-Ṣaghīr, 1994: 162-175).

Conclusions

Authority in annals of the history of the Islamic cultural legacy is a complex phenomenon that must be analysed and understood, within specific social paradigms, in light of the social and political function of knowledge and how it created the necessary and perennial relationship between the possessor of knowledge and the possessor of political power. The immediate and apparent picture that emerges, though, from the lived reality of the Islamic cultural legacy demonstrates that it was

the political authority its power always pervasive, though it was very swift to resort to brute force if deemed necessary – that directed and dominated that relationship. Political rulers allowed scholars to function undisturbed only in proportion to their knowledge activity, which had no bearing upon their rule. But knowledge by its nature can never be silent or neutral. And that is something the ruler knows and therefore he does not accept neutrality from the scholar.⁷ And therein lies the potential power of the intellectual authority.

The situation at the end of the twentieth century and the beginning of the twenty-first century seems not to have changed, at least, not radically. The question is whether Muslim scholars can continue to build on the intellectual tradition that they have inherited and yet seriously engage, if not radically reconstruct, the epistemology on which the past scholars have conducted knowledge activity. An epistemology that will enhance the realization of the Islamic *weltanschauung* so beautifully described by Raḥmān: the establishment of essential human egalitarianism and the constitution of a community for goodness and justice in the world; in one phrase an ethically based sociopolitical order “under God”. A knowledge tradition in which the deepest concerns of the Islamic ontology, as espoused in the Qurʾān, will be reflected. Until then Muslim scholars will have to be content with the perennial question asked since the end of the nineteenth century: why have the Muslims lagged behind whilst others (read, the West) have advanced? Without any tangible answer, that is!

⁷ For example, the neutrality of ʿAbd-Allah b. ʿUmar did not save him the wrath of the Umayyad governor al-Ḥajjāj b. Yūsuf who, according to ʿAbū al-ʿArab ʿI-Tamīmī in his *Kitāb al-Miḥn*, had a hand in the death (read, assassination) of ʿIbn ʿUmar. The ruling authority is not satisfied with mere non-opposition; rather it demands unconditional support (al-Ṣaghīr, 1994: 126-130).

CHAPTER FOUR

SHĀFI'Ī'S *BAYĀN* PROJECT

Towards Precision and Order (*Naḥwu al-Ḍabṭ wa 'l*

Tanzīm)

The day when scholars of Traditions speak (articulate) it will be with the tongue of that lad.

(Muḥammad b. al-Ḥasan al-Shaybānī)

Shāfi'ī is a philosopher in four things: In language, meaning [of words], differences of opinion] of people and law

(ʿAbd al-Rāziq, u.d: 231)

This thesis is essentially a critique of Fazlur Raḥmān's notion of the living *Sunnah*. However, such a critique places one squarely in front of Shāfi'ī's treatises. Indeed, Muḥammad b. al-Ḥasan al-Shaybānī in the quote above is referring to Shāfi'ī and his eminence as a scholar. He predicts Shāfi'ī's success since no other person had at the time reached his level of articulation of the *Sunnah*. The second quote as far reaching in its indication, as the first, is by Aḥmad b. Ḥanbal. Raḥmān challenging Shāfi'ī's thought then requires an in-depth analysis of Shāfi'ī's works, which is the focus of this chapter.

To understand Raḥmān analysis in relation Shāfi'ī's work, my aim is simply to critically ask the question why would Shāfi'ī engage and challenge an entire

tradition (the living *Sunnah*) of three generations, which he problematized for not residing wholly in the two texts, the Qurʾān and the *Sunnah*, and destroy it? This Raḥmān claims and in fact laments. Why did he employ an arsenal of hermeneutic rubrics such as *ʿamm/khāṣṣ*, *jumlaḥ/naṣṣ*, *naskh*, *ikhtilāf al-ḥadīth*, etc. The answers to these questions allows one to understand and engage Shāfiʿī's discourse in terms of its strengths and weaknesses, its competence and mastery, and its incoherence and striking propensity for rationalizing contradictions in source interaction. More importantly, it identifies how Raḥmān's assertions contrast with Shāfiʿī's work and highlight the limitations of his refutations in respect of the latter.

This chapter reads Shāfiʿī's *bayān* from two angles. One, it interrogates Raḥmān's assertion that Shāfiʿī was anti-rationalist and that he spearheaded a decisive and successful intervention in the living *Sunnah* that created stability but at the cost of creativity and originality. Two it critically engages Shāfiʿī's hermeneutical devices that allowed him to deal with the contradictions in the *ḥadīth*, which was hitherto not synonymous with the *Sunnah*, from which he reconstructed the Prophetic *Sunnah*.

The first reading is an external critique. It is external in that it reflects on the views of scholars who hold this view, one which this thesis does not itself hold. In fact this thesis very much challenges the aforementioned analysis and conclusions. The views of Raḥmān and Naṣr ʿAbū Zayd make up the core

content of this critique, which in sum is a rejection of Shāfi'ī's methodology. I find their critique to be fundamentally ideological in nature.

I call their critique ideological in order to separate it from that of the Orientalists who in my view, read Shāfi'ī as not overtly ideological. Further, their critique of Shāfi'ī is not only a simple and innocent academic evaluation, again unlike that of Orientalists, rather it embraces their own methodologies towards a new discourse whether Modernist, Post-Modernist, Enlightened or Secularist within Islam.

The second reading is an internal critique formulated by this thesis and rests on seeking a scientific analysis of the topic. In this regard, I employ Joseph Lowry's *The Legal-Theoretical Content of the Risālah of Muḥammad b. 'Idrīs Al-Shāfi'ī* and Wael Ḥallāq's *A History of Islamic Legal Theories* as primary sources.

1) Biography

According to the majority of the historians of the jurists, Muḥammad b. 'Idrīs al-Shāfi'ī was born in 150/767 in Gaza (ʿAbū Zahra u.d: 14), although some narrations purport that he was born in ʿAsqalān, or Yemen or Makkah. His lineage is Qurashiite more precisely linked to al-Muṭṭalib brother of Hāshim, the Prophet's great grandfather. He was orphaned at a very young age where upon his mother moved to, and raised him in Makkah, primarily to preserve his

Qurashiite lineage, but also because of poverty. There is agreement that he studied in Makkah as a student of Sufyān b. ʿUyayna and in Madīnah where his principal teacher was Mālik b. Anas).

He seems to have had a connection with Yemen. Some sources suggest that he was born there, not least because his mother, according to Shāfiʿī himself, was from Azd a great Yemeni tribe. Other suggestions are that he went to Yemen to work as either a judge in Najrān or as an assistant to a judge. Yet still others suggest that he went to Yemen to foment revolution, supposedly in line with claims that he had Shīʿite leanings, or else, to oppose those who were fomenting revolution (Lowry, u.d: 3-4).

Lowry supports his stance, by referring to ʿAbū Nuʿaym who preserved many anecdotes of Shāfiʿī's supposed trips to Yemen. These anecdotes ascribe different motives to Shāfiʿī's visits to Yemen. For example, Schacht holds that his visit(s) to Yemen was for personal reasons. Chaumont asserts that he joined a Shīʿite rebellion while al-Nadīm in his *Fihrist* labels Shāfiʿī as “*shadīd fī al-tashayyūʿ*” or strongly Shīʿite. Whatever Shāfiʿī's motive(s) might have been, it refutes Naṣr ʿAbū Zayd's simplistic and ideologically informed claim that Shāfiʿī's going to Yemen especially when he worked there as a judge was just a single indication amongst others, including his religious discourse, that he willingly co-operated with the political authority.

2) The *Bayān* Scheme: Shāfi‘ī at Work

It is in the *Risālah* that Shāfi‘ī articulated his mission. Wael Ḥallāq sums it up as the following basic principles: (1) the law must be derived exclusively from revealed scripture; (2) the Prophetic *Sunnah* constitutes a binding source of law; (3) contradiction exists neither between the *Sunnah* and the Qur‘ān nor among verses or *ḥadīths* within each of these two sources; (4) the two sources compliment each other hermeneutically; (5) a legal ruling derived from unambiguous and widely transmitted texts is certain and subject to no disagreement, whereas a ruling that is inferred by means of *ijtihād* and *qiyās* may be subject to disagreement: and (6) that *ijtihād* and *qiyās*, as well as the criteria of consensus, are prescribed by the revealed sources (Ḥallāq, 1997: 30-31). Lowry calls it the *bayān* scheme; he translates *bayān* as statement or, more precisely, a statement of a particular rule of law. In it the entirety of law resided in two texts, the Qur‘an and the *Sunnah*, the idea that lies at the core of the *Risalah* (Lowry, u.p: 19).

I contend that two components and stages, namely the philosophical and the organizational, can be demarcated in Shāfi‘ī’s *bayān*, which help to identify both his strengths and inconsistencies. The components are referred to as such because the *bayān* is constructed out of these two separate yet organically linked entities. Stages, because the philosophical idea of the *bayān* precedes its organizational structure. The philosophical is Shāfi‘ī’s abstract

conceptualisation of the Prophetic *Sunnah* and its authority, while the organizational is his method of reconstructing the *Sunnah*. Thus, after having conceptualised his *bayān* idea he engaged this information from which he then reconstructed this authoritative Prophetic *Sunnah*. I identify the philosophical as the core aspect of the *bayān* and I find it both natural and intelligible whilst it is the organizational aspect that is the object of my critique where I hope to highlight Shāfi'ī's contradictions and at times idealism.

It is also my contention that by reading Shāfi'ī's with an awareness of these two separate yet organically linked stages that a better and more balanced evaluation of his work can be carried out. I believe that it is because of failing to do so that Raḥmān and ʿAbu Zayd have made a rather one sided and at times superficial critique of Shāfi'ī, stooped in a lamentation that Shāfi'ī's destroyed a living tradition or in an analysis of suspicion by Raḥmān and ʿAbu Zayd respectively. It is equally true also that the contemporary champions of the classical discourse have failed to construct a critical discourse on Shāfi'ī.

2.1) The Philosophical Component and Stage

The thrust of Shāfi'ī's *bayān* is to establish authority for the Prophetic *Sunnah*. In this regard he is not at all concerned with the Qur'ān, which he sees as an already as universally accepted source of legislation whose authority is not questioned and contains very little law in comparison to the *Sunnah* (Lowry, u.d: 36). It is the *Sunnah*, which he deeply cares about. He aims to prove that

the *Sunnah* is a valid, binding, independent source of law and more importantly is the exclusive legislative supplement to the Qurʿān both as an independent source of legislation and in its interaction with the Qurʿān.

As noted in chapter one, local doctrines and the opinions of individuals were hitherto treated almost equivalently to the *Sunnah* of the Prophet. This was a defining feature of this period. Islamic jurisprudence was characterized by direct appeals to practical reason through *raʿy* or dependence on the juristic dicta of famous scholars and simply by no explicit aim to authority. In short it rested on the “divergent conceptions of legal authority in this period” (Brockopp, 2002: 4-17, Fadel, 2002: 161).

Starting from paragraph 53 of the *Risalah* Shāfiʿī explains the significance of *bayān* and how it is to be realized. He says:

The totality of what God has made clear to His creation [*abāna li khalqihī*] in His Book...are several: (1) Among them are those things which God has expressed in an explicit text [*naṣṣ*] like his general obligations, to wit, that they must perform prayers...He has forbidden wine drinking... (2) And among it what he has confirmed in His Book [*aḥkama*] and then explained it on the tongue of His Prophet such as the number of prayers... (3) Among them too, things for which God’s Messenger has provided a *Sunnah* and in respect of which God has no explicit rule. God has, in His Book, imposed the obligation to obey His Messenger [*the Sunnah*], and to carry out His rulings [*wa qad farāḍa Allah fī kitābihī ṭāʿata rasūl lihi wa ʿl intihā ilā ḥukmihi*]... (4) And also among them ...which God has imposed on His creation...to

seek them out by means of legal interpretation [*ijtihād*]. Emphasis mine (Shāfi‘ī, 1979: 21-22).

From paragraphs 258 to 309 of the *Risālah* he argues passionately for the special position of the Prophetic *Sunnah*. His argument is filled with verses of the Qur‘ān and his own rational interpretation of these verses, which constitute a solid synthesis of textual proofs and rational deductions (Shāfi‘ī, 1979: 79-105). The single, fundamental religious and spiritual implication is that God has not only obligated obedience for Muḥammad but also linked his (Muḥammad’s) obedience to obedience due to God. From his re-citing and interpretation of these verses, Shāfi‘ī’s religious methodology is clear: a Muslim’s obedience to God is contingent upon his or her obedience to the Prophet. His argument is at once academic and rational and also spiritual and religious – one’s faith depends upon accepting the Prophet and his *Sunnah* as the only authority after that of the Qur‘ān, which here indicates God.

Before I come to the organizational component and the stage of the *bayān* I want to first deal with the external critique as mentioned earlier of Raḥmān and ‘Abu Zayd. Their primary critique and persistent accusation is that al-Shafi‘i was anti-rational; that he was the literary symbol and pioneer of an anti-rationalist epistemology. They base this critique on their reading of Shāfi‘ī’s notion of *ijmā‘*, apart from their general critique of his conceptualization of *Sunnah*, and his alleged political belief.

2.2) Shāfi'ī and *Ijma*

To Raḥmān Shāfi'ī's concept of *ijmā'*, as diametrically opposed to the *ijmā'* of the early generations, is indicative of his abhorrence of free-interpretation (*ijtihād*). The *ijmā'* of the early generations was a continuous process of independent reasoning to create and recreate the *content* of the *Sunnah* and the guarantee for the rectitude or the working infallibility of the growing content of the *Sunnah* (Raḥmān, 1994: 19).

Shāfi'ī rejected any claim that *ijmā'* has and can be achieved in this manner. *Ijmā'* is only possible on the essentials (*jumlah al-farā'id*) of which no one could be ignorant. Further when *ijmā'* is claimed no one will be found to disagree such as the amount of units or *raka'āt* in each prayer as in the case of *Zuhr*, which has four or the prohibition on drinking alcohol (Shāfi'ī, 1983, vol. 7: 295). For Shāfi'ī, *ijmā'* is akin to a kind of spiritual solidarity of the Muslim *jamā'ah* on the principles of *ḥalāl*, *ḥarām* and *ṭā'ah* (obedience), principles which have been clearly defined and demarcated by God and His Prophet and not left to the opinions of men (Shāfi'ī, 1979: 472-475).

This is in line with Shāfi'ī's epistemology that *ijmā'* does not and cannot exist independently of and is totally subordinated to the authority of the Qur'ān and *Sunnah* under whose aegis it must be brought. Thus according to Lowry he walked a kind of tightrope seeking to maintain a rigorous ontological distinction between *Sunnah* and *ijmā'* (Lowry, u.d: 427-471).

Ijmāʿ for the ancient schools though was their local consensus, specifically that of the Medinese although the ‘Irāqīs’ extended, in theory, to all regions, and they were not very tolerant and accepting of other schools’ consensus. What was achieved at best was some type of inferred consensus on the opinion(s) of a scholar(s) when no one was known to have disagreed with it (*lam yuʿlam lahu mukhālif*). The ancient schools’ *ijmāʿ* had an obsession with *iḥāṭah* (complete comprehension) hence their declaring of their interpretations to be *ijmāʿ* with binding authority, which in essence meant a stifling of difference of opinion.

Thus what Shāfiʿī opposed, was not *ijmāʿ* per se, but an obsession with getting everything completely right especially of some person or regional school’s interpretation and declaring it *ijmāʿ* whilst excluding the opinions of others. Shāfiʿī then is the one, ironically so, who acknowledged and accepted disagreement as the necessary and natural result of *ijtihād* and not the champions of the living *Sunnah*. What he demanded though was order and uniformity. Raḥmān’s claim that the *ijmāʿ* of the early generations was a type of working infallibility is therefore a somewhat romanticized notion. In fact, a rationalist of the stature of the *Muʿtazilite* ʿIbrāhīm al-Nazzām regarded the consensus of the community on questions left to personal opinion and systematic reasoning fallible.

But Shāfiʿī, as Schacht says, was unable to dispense completely with the idea of consensus of the scholars. It is here, in my view that the contradictions in *bayān* scheme appear. Faced with, what had by now become a normative mass of information made up from the individual interpretations of the early generations (their *ijmāʿ*) and Prophetic *aḥadīth* that came to constitute the content of the *Sunnah*, he found himself unable to reject all these materials. Indeed, a considerable amount of it was Prophetic sayings and practice in the form of *ḥadīth*, which existed from the very beginning of Islam and throughout the Prophet's lifetime. As Raḥmān notes, the *ḥadīth* from the Prophet must have existed from the very beginning of Islam (Raḥmān, 1994: 29).

Nonetheless, it was no mean feat, after almost two centuries, to clearly separate Prophetic *aḥadīth* from the opinions and interpretations of the early generations. As Raḥmān rightly says, already in Shāfiʿī's time a vast number of *ḥadīths*, originally the opinions of individuals, had become available (Raḥmān, 1982: 26).

Shāfiʿī accepted, rather naïvely it seems, the claims of the jurists as sound when they mentioned that their agreement on a particular matter was based on a report or story of the Prophet. For example, he says to his interlocutor that if the people say that what they have agreed to, is based on a report from God's Messenger then it should be as they say, God willing (al-Shafi'i, 1979: 472). This is wishful thinking on his part. It is from these very materials that he reconstructs the Prophetic *Sunnah*. In other words he redefined *Sunnah* from

the many *sunnas* or arbitrary opinions of the early jurists which were products of the *Sunnah-ijtihād-ijmāʿ* relationship. Thus the very *ijmāʿ* of the early generations that al-Shafīʿī had rejected became for him a substantial source of information.

2.3) Shāfiʿī's Political Ideology

As a general point of departure ʿAbu Zayd charges Shāfiʿī with an attempt to negate the intellect when the latter rationally, and paradoxically so, establishes the principle that only the revealed text of the Qurʿān and the *Sunnah* contains solutions to all problems. For ʿAbu Zayd, what this in reality indicates is Shāfiʿī's ontology of theistic predetermination. ʿAbu Zayd demonstrates his claim with an example. Shāfiʿī's position on the use of the word *kulli* (all) a term that indicates generality (*dilālah al-ʿāmm*) in the Qurʿānic verse: "God is the Creator of everything" he says, as remaining general and not particularized is indicative of Shāfiʿī's ideological adherence to the doctrine of theistic predetermination that negates human free-will and deprives humankind of the right to choose his actions. Supporting this is Shāfiʿī's willingness to cooperate with the political authority (ʿAbu Zayd, 1996: 62-69).

ʿAbu Zayd adopts a methodology of projection (*manhaj al-isqāṭ*) when analysing Shāfiʿī. Here he is guilty of vulgar eisegesis in that he reads into Shāfiʿī his ideological belonging that stems from his objection and total rejection of the current dominant "re-actionary" atavistic discourse (*al-khiṭāb*

al-salafī al-rajāʿī al-muḥaymin al-muʿāṣir), of which he regards Shāfiʿī to be the pioneer.

Firstly, Shāfiʿī's notion and employment of *ʿāmm* in the verse cited as well as revealed texts must be understood within the broader context of the *ʿāmm/khāṣṣ* hermeneutic rubric. It was one of his hermeneutical tools to, amongst other things, harmonize what was thought to be potential contradictions between Qurʿānic verses and between Qurʿān and *Sunnah* on the one hand and *Sunnah* and *Sunnah* on the other. His application of *ʿāmm/khāṣṣ* is thus strictly legal.

Secondly, Shāfiʿī's alleged willingness to co-operate with the political authority must be rejected as unfounded. ʿAbū Zayd's conclusion that he co-operated with the state simply because he worked in its service in Najrān is simply not convincing. That many scholars worked in the service of the State or even had a cordial relationship with it does not necessarily mean that they co-operated with the political authority, more so willingly. One such person is Mālik b. Anas, ʿAbū Zayd's example of a rationally orientated jurist who refused to co-operate with the political authority. Mālik not only had a good relationship with Caliph al-Manṣūr he compiled the *Muwattaʿah* on the advice of the latter (ʿIbn Khaldūn, 1958, vol. 1: 34; ʿIbn Qutayba, 1990, vol 2: 202).

Contrast this with Shāfi‘ī’s writing of the *Risālah* which was one, written on the request of an ordinary person called ‘Abd al-Raḥmān b. Maḥdī and not the Caliph and, unlike the *Muwaṭṭah* which, in essence, does not contain creative and original views, but rather the progressive interpretations of earlier generations, the *Risālah* is an original and innovative work however retrogressive it may be viewed.

In addition, Mālik even accepted gifts from the ‘Abbāsīd Caliph (‘Ibn Qutayba, 1990, vol.2: 203). Can Mālik, in receiving gifts from al-Manṣūr be accused of co-operating with the political authority? In fact he also never engaged in political activity or rhetoric against the State. He was lashed once, for narrating in a purely academic capacity and not politically motivated at all, a *ḥadīth* not his own juristic verdict, by the rather over-zealous governor of Madīnah, Ja‘far b. Sulaymān who viewed the *ḥadīth* potentially dangerous as it stated that political allegiance for the Caliph under coercion is not binding. Nevertheless al-Manṣūr apologized to Mālik and removed the governor from his post in a most humiliating manner (‘Ibn Qutayba, 1990, vol 2: 197).

Ironically it is in Shāfi‘ī’s working for the State that he stands out as an independent scholar who very soon earned the wrath of the political authority when he pointed out and objected to the governor’s unjust treatment of his subjects. The latter reported him to Caliph Hārūn al-Rashīd with the accusation of plotting to overthrow the state. Shāfi‘ī, he warned al-Rashīd, was able to do

with his tongue what a warrior could not do with his sword. (ʿAbū Zahra, u.d: 20-22).

The *Risalah* precisely deals with the critical question of obedience (*ṭāʿah*) in order to establish to whom it is due. Shāfiʿī is unequivocal that it is due only to God and His Prophet. Once *ṭāʿah* as an abstract notion has been delineated within the *bayān* matrix of the Qurʿān and the Prophetic *Sunnah* it then fundamentally covered and qualified authority whether political, intellectual or of any other form. A primary concern of Shāfiʿī was rectification of concepts (*taṣḥīḥ al-mafāhīm*) i.e. how they are understood and employed especially by those in authority like rulers, scholars, fathers and men.. Hence he is at pains to elucidate concepts such as command, obedience and legitimacy (al-Ṣaghīr, 1994: 157-183).

Although al-Shāfiʿī did not, directly, address or confront the political authority, one corollary of his delineation of *ṭāʿah* is the restriction of the power of the ruler even if in theory only. If opinion is practiced outside the notion of *ṭāʿah* to one universal authority (Qurʿān and *Sunnah*) then it becomes possible for the one who possesses the greatest means, to enforce his opinion. That is precisely what potentially characterized the living *Sunnah*.

Given the above, the entire notion of Shāfiʿī as an anti-rationalist must be put to the test or at least qualified. As Lowry says: “Although I believe that an important implication of Shāfiʿī’s theory of the *bayān* is that he is anti-

rationalist, in the (perhaps limited) sense that he eschews abstract reason as a source of authority, some recent revisionist scholarship has viewed his thought as more hospitable to the use of reason than had previously been thought” (Lowry, u.p: 42).

The reception of Shāfi‘ī, and in fact the *Risālah* for a whole century after the death of Shāfi‘ī, by other scholars of his time makes it difficult to place him in, or for that matter exclude to him from either of the traditionalist camp or the rationalists camp. The traditionalists thought him to be involved with the rationalists and accused him of Mu‘tazilite tendencies. For the rationalists, in turn, he was an advocate of some fundamental traditionalist doctrines (Hallāq, 1997: 31; ‘Abd al-Rāziq, u.d: 226). As further proof of this point, it is quite revealing that the champion of the traditionalist camp, ‘Ibn Qutayba (d. 276) in his book *Al-Ma‘ārif* does not list Shāfi‘ī among the *aṣḥāb al-hadīth* (traditionalists), nor does he place him among the rationalists (‘Ibn Qutayba, 1987: 277- 286).¹ He mentions Shāfi‘ī only in passing reference in his *Ta’wīl* numbering him amongst a group of jurists (‘Ibn Qutayba, u.d: 210).

Muṣṭafā ‘Abd al-Rāziq narrates an anecdote as further evidence that Shāfi‘ī was not – considered – from the *ahl ‘l ḥadīth*. Muṣ‘ab al-Zubayrī narrates that his father and Shāfi‘ī used to compose poetry. Shāfi‘ī recited some poetry from

¹ It is inconceivable that ‘Ibn Qutayba had no knowledge of Shāfi‘ī. He knew Shāfi‘ī’s teacher Sufyān b. ‘Uyayna and ‘Abd al-Raḥmān b. Maḥdī on whose request Shāfi‘ī wrote the *Risālah*, having listed them both as traditionalists (‘Ibn Qutayba, 1987: 280-286).

the tribe of Hudhayl and said to [Muṣʿab or his father] do not let the *ahl ʿl ḥadīth* come to know of this for they do not tolerate it. (ʿAbd al-Rāziq, u.d: 220).

Shāfiʿī recognized that the human capacity to reason plays a positive role. Two passages from the *Risālah* demonstrate the point. In paragraph 1445 he says that God bestowed intellects on humankind and, by means of these indicated to them how to distinguish between disparate things. In paragraph 1453 he says that, if the scholars seek the answer by means of *ijtihād* using their intellects and their knowledge of the indications after seeking assistance from God, then they have carried out what is incumbent on them (Shāfiʿī, 1979: 501-503). In two instances, he identifies solutions to problems as *maʿqūl* (reasonable) – not based on text - describing his solutions as follows: the one which is most obvious intelligible (*al-maʿqūl al-zāhir*) and what he considered to most closely resemble the policy of God’s Book, and what is reasonable (Lowry, u.d: 419-420).²

Shāfiʿī refers to the intellect pejoratively when he uses the phrase *ahl ʿl ʿuqūl*. By this he means those group of people (scholars) who refuse to tie legal interpretation to revelation, that is, their use of *istiḥsān* and abandoning of *qiyās*. It is clear that Shāfiʿī is not against the intellect or rationalism per se. Rather he is against the unregulated and arbitrary usage of opinion in legal interpretation. As Lowry says he censures the abstract use of the intellect, i.e.

by means of *istiḥsān* but endorses *istidlāl*, that describes the jurist's mental process in hard cases where there is no explicit text ruling (Lowry, u.d: 417-423).

In line with my claim that the living *Sunnah* was an arbitrary practice, lacking a coherent structure within which to function, and that it was very much the result of political excesses, I argue that if Shāfi'ī was anti-rational then he was anti-rational precisely because of that reality. He was anti-rational only in proportion to a living tradition that was fraught with contradictions and manipulated so easily by the political authority. In a milieu where the political authority, in reality, had the exclusive say on matters of opinion it seems that that reality could only be challenged by a discourse that apparently shunned a rationality that was so exploited and incoherently conducted.

3) The Organizational/Operational Component-Stage

It is at this stage that Shāfi'ī demonstrates his skills at applying his hermeneutical techniques, primarily to harmonize conflicting texts and contradictory passages. He is at pains to show that source texts in their interaction, inter or intra, can combine to express coherent rules, and that no textual problem, born out of contradictory or what would only be apparently contradictory, in his view, is too difficult to be explained and resolved. Through these hermeneutical techniques, seven in number, he organizes the

² See *al-Risalah*, pp. 478-503

components of his *bayān*. Out of the seven, I will discuss two. They are the *‘amm/khāṣṣ* hermeneutic rubric and the *naskh* hermeneutic tool.³

I will try to demonstrate that a substantial part of Shāfi‘ī’s application, of these hermeneutic tools, illustrates his uncritical zeal to negate what he had accepted as the content of the *Sunnah*, which was permeated with conflict and by his time had already been projected back to the Prophet and some to the Companions or evolved into *ijmā‘*. As Coulson says: “Shāfi‘ī’s insistence, upon this overriding role of the *Sunnah* of Muḥammad and his outright rejection of any arguments which tended to jeopardize it, can best be seen in his approach to the question of apparent contradictions in the substance of the divine revelation” (Coulson, 1978: 57). As a theorist, Shāfi‘ī failed to achieve equilibrium between principal (*bayān* idea) and judgment (materials of the *Sunnah*). As Rawls argues that the judgments with which a theory is required to be in equilibrium are considered judgments of justice. And if the theorist decided that the judgments are the product of questionable influences or instincts, he should attain equilibrium by revising the judgments rather than the principles (Kukathas and Pettit, 1990: 7-8). Shāfi‘ī does no such thing; his aim is to achieve the principal (the *bayān*) irrespective of the inherited materials.

Before I give my critique of Shāfi‘ī’s particular employment of *‘amm/khāṣṣ* and *naskh* I want to state that I do accept these tools of interpretation, in

³ Lowry cites the seven as *‘amm/khāṣṣ*, *naskh*, *ikhtilāf al-ḥadīth*, *jumlah/naṣṣ*, *nahy*, *isnād yās*.

principal, as both natural and necessary and that Shāfi‘ī, and others, have indeed applied it, at times, naturally and logically in legal interpretation.

3.1) ‘Āmm/Khāṣṣ Hermeneutic Rubric

Lowry designates two salient features of the ‘āmm/khāṣṣ rubric as it is used in the *Risalah*. The first takes a legislative pronouncement found in one text, the ‘āmm which seemingly applies generally to all people and then on the basis of another text (*khāṣṣ*) restricts and narrow the scope of the first text’s application to specific people. For example the Qur‘ānic rules governing inheritance by spouses and parents or children of the deceased, are expressed in general terms, but the Sunnah has limited their sphere of application:

The *Sunnah* of God’s Messenger indicates that He [God] only meant certain parents and spouses and not others. That is, [he required] that the religion of the parents and their children and of the spouses, be the same, and that the heir who is a parent or spouse not be a murderer [of the deceased] and not a slave (Shāfi‘ī, 1979: 65).

The second is a technique for harmonizing potential contradictions, which involve source interaction viz. Qur‘ān /*Sunnah* and *Sunnah/Sunnah* (Lowry, 2004, vol.11: 9-10). Some of these “potential” contradictions were indeed stark contradictions. As Burton says any student is aware of the extent to which *Sunnah* contradicts *Sunnah* (Burton, 1990: 3). However, for Shāfi‘ī there were no contradictions at all; his arsenal of hermeneutic tools allowed him to

explain away contradictions as only apparent; for as he said *Sunnah* never contradicts the Qurʿān or *Sunnah* (Shāfiʿī, 1979: 146). If he meant with *Sunnah*, what Raḥmān calls, the concept of *Sunnah* as opposed to content, then he was right. However, he summarily and quite capriciously took it for granted that all these materials were the *Sunnah* of the Prophet and not possibly the opinions of the early generations as well.

The very example on inheritance is indicative of that conflict that is the ruling that the Qurʿān verse is restricted by *Sunnah* which states that people i.e. parents, children, and spouses cannot inherit from one another if their religions differ. Yet we find that this was not a unanimous “*Sunnah*” accepted by all; Muʿāwiya b. ʿAbi Sufyān issued a verdict that a Muslim heir can inherit from his or her Christian or Jewish deceased parent, child or spouse. One of the scholars commented that this was the best verdict he had ever heard (Ḥawās, 1997: 61). Can one not question whether *Sunnah*, like this, which totally forbids Muslims inheriting from non-Muslims parents, was really *Sunnah* or originally someone’s opinion that became “*Sunnah*”? In addition, one wonders, had Muʿāwiya (as a political authority) not given that verdict whether we would have had this *Sunnah*, which is clearly in conflict with the first *Sunnah*. For Shāfiʿī these “apparent” contradictions can easily be rationalized or eliminated through the *ʿamm/khāṣṣ* hermeneutic rubric.

3.2) The *Naskh* Hermeneutic Rubric

By Shāfi‘ī’s time the phenomenon of *naskh* had already been in operation along various diverse theories. As Burton says: “*Naskh* refers not to one, but several quite unrelated ‘phenomena’ which were gradually brought under the one rubric, owing to a series of decisions taken in the course of the development of what was to prove a spectacularly ‘successful’ theory” (Burton, 1990: 18).

According to Burton, the first was wholly exegetical i.e. Muslims thought they had detected contradictions, however slight in their view, in the Qur‘ān e.g. Q 2:256 that states there should be no compulsion in religion was thought to refer only to the People of the Book who were not to be converted by force, whilst in respect of polytheist (*mushrikīn*) it was thought to have been abrogated by Q 9: 5 which states kill the polytheists wherever you find them (Burton, 1990: 1-3). This alleged contradiction was clearly imagined, hence the need for a tool to explain it away; *naskh* became that tool. Ayatollah ‘Abū ‘l Qāsim al-Khoei, d. 1992) although he accepts the phenomenon of *naskh* in principle, likewise refuted beyond doubt the claims that so many verses of the Qur‘ān had been abrogated (*naskh*). Out of the 138 verses that are said to have been abrogated he found that not one, in reality, has been abrogated (al-Khoei, 1987: 277-379).

There are other theories, not premised on any notion of contradiction between the sources but on the idea of superseding them where Qur‘ān superseded Qur‘ān, *Sunnah* superseded Qur‘ān, Qur‘ān superseded *Sunnah* and *Sunnah*

superseded *Sunnah*. There is also the view that *naskh* is indicative, in the words of ʿAbu Zayd, of the greatest proof of the progressive dialectic between revelation and the lived reality as *naskh* is the cancellation of one ruling by another ostensibly to meet the vicissitudes of time and perhaps space.

If, says ʿAbu Zayd, the text in its fundamental character, from the perspective that it is revelation that begins from concepts of the [human] lived reality then it must in its evolution take that reality into account (ʿAbu Zayd, 1994: 117-120). There are of course Muslim scholars, both ancient (the most notable ʿAbū Muslim al-ʿIṣfahānī) and contemporary such as Ḥasan al-Bāqūrī who reject the idea of *naskh* altogether.

For Shāfiʿī *naskh* is a hermeneutical tool. It represents an attempt to explain the interrelationship of two or more revealed source texts by putting them into a historical sequence, and further, representing the means for explaining or eliminating apparent contradictions. It allows the contradictions to stand and then resolves them through the claim that one of the several irreconcilable texts came later in time and superseded the other(s). Thus *naskh* represents an acknowledgement of contradiction but explains it as part of a divine legislative plan that unfolds inside time and space (Lowry, u.p: 122-123).

A careful perusal, however, of the *Sunnah* content reveals that it was *naskh*, which allowed for material permeated with countless contradictions, to be passed as *Sunnah* in any case. Because proving the occurrence of *naskh* was no

easy matter. It depended fundamentally on precise historical knowledge of the Occasion of Revelation (*asbāb al-nuzūl*) in order to know which verse or *ḥadīth* was revealed last i.e. the *nāsikh* (the ruling that abrogates), and which one was revealed first i.e. the *mansūkh* (the abrogated ruling) (Abu Zayd, 1994: 121). To do this the very conflicting material, to which *naskh* was to be applied, was depended on. It is here that much of these materials, in order to abrogate or be abrogated or both, had to be attributed to the Prophet. As Burton says, attribution is *isnād*; *isnād* implies chronology and chronology is the very essence of *naskh* (Burton, 1990: 17).

3.2.1) Naskh at Work: Punishment for Adultery

In order to dispel any notion of conflict between the various Qurʾān verses and the numerous *ḥadīths* on the punishment for adultery, Shāfiʿī argues primarily on the basis of *naskh*, that Qurʾān 4:15-16: “Those of your women who commit abomination (*fāḥishah*)...detain them in their quarters until death overtakes them until God appoints a way for them...” revealed first was abrogated by Q 24:2: “the female and male adulterers flog them each one hundred lashes...” Then the *Sunnah*, he so-called, ‘Ubāda *ḥadīth* intervenes which drastically changes the rule of Q 24:2 states: “Take this from me...God has appointed a way for them; the virgin [who fornicates] with a virgin: one hundred lashes and one year’s banishment; the non-virgin with a non-virgin: one hundred lashes and stoning [to death].”

From the text of this *ḥadīth* we note that it addresses the penal regime of Q 4: 15-16 (God has appointed a way for them), meaning that it was an instance of either explanatory *Sunnah* or stand-alone Sunnaic text that brought a new ruling. However in paragraph 376 of the *Risālah*, Shāfi‘ī states that Q: 24: 2 abrogates the provisions of Q 4: 15-16 (Shāfi‘ī, 1979: 129). A further instance of abrogation now occurs within the *Sunnah* materials when the Prophet only stones two non-virgins (Mā‘iz and the employer’s wife) on two separate incidents and does not flog them; flogging for non-virgins had been abrogated.

These reports are indicative of a pervasive conflict in the *Sunnah* material as well as an assumption in the interpretation of what Q 4: 15-16 (its penal provisions) meant. In turn it developed into conflict between the Qur‘ān and the *Sunnah* materials. Shāfi‘ī’s claim that Q 24: 2 abrogated Q 4: 15-16 rests on an erroneous premise that the word *zinā* in Q 24: 2 is equivalent in all material respects to the abominable act described as *al-fāḥishah* in Q 4: 15-16. As al-Khoei states the word *al-fāḥishah* can refer to any extremely lewd and ugly act between two women, or between two men, or heterosexual, or beyond that, and not to any one of these specifically (al-Khoei, 1987: 310-311).

His insistence that the second *Sunnah*, the stoning of Mā‘iz, the employer’s wife abrogated the first *Sunnah* (‘Ubāda *ḥadīth*) is arbitrary, especially in the face of ‘Alī b. ‘Abī Ṭālib’s practice to first flog and then stone the non-virgin adulterers, well after the demise of the Prophet – *naskh* can only take place

during the life of the Prophet - claiming that he does so on the basis of the Book of God and the *Sunnah* of the Prophet (Shāfi'ī, 1983, vol. 7: 190).

Confronted with 'Alī's practice (*Sunnah*) Shāfi'ī would have to reply that 'Alī did not know that the 'Ubāda *ḥadīth* has been abrogated by the Mā'iz incident, it is established in the *Sunnah* that the virgin is only to be flogged and the non-virgin only to be stoned (Ibid, 190). Shāfi'ī would be guilty of pure conjecturing. But that is of no concern to him; his dictum that *Sunnah* never contradicts *Sunnah* (which is true conceptually) allows him to summarily assume – there is no historic proof of such as a narration - that 'Alī did not know the Mā'iz incident.

Another important indication of inter and intra conflict between the revealed texts on the punishment for adultery is 'Umar's statement that it was once in the Qur'ān; according to one of three modes of *naskh* its wording has been removed, but its ruling remains. Shāfi'ī, however, does not in any way cite this alleged verse as proof for the stoning to death of the non-virgin adulterer. At this stage we might ask, was this not 'Umar's opinion that *rajm* ought to be the punishment for non-virgin adulterers which then came to be understood that he regarded it as once having been in the Qur'ān.

Naskh then, as Lowry, says allowed Shāfi'ī to arrange legal texts from Qur'ān and *Sunnah* in such a way as to instrumentally rather than arbitrarily prove that all law is contained within the two and that together they provide a seamless

and harmonious web of interlocking obligations (Lowry, u.p: 144-145). For this debate however his employment of *naskh* to summarily explain away conflict between the Qurʿān and *Sunnah* materials on the one hand, and between *Sunnah* and *Sunnah* on the other, is only one indication of his zeal, through sheer technical mastery, to at all cost uncritically ensure the establishment of the *bayān*. What it does though in the process is to highlight the tension and discontinuity between its abstract theory and the content through which it is concretized.

However, somehow it seems, that he was aware of this serious contradiction in his *bayān* scheme. It is for this reason, in my view, that he rejected any theory that Qurʿān abrogates *Sunnah* or that *Sunnah* abrogates Qurʿān. He might therefore have been aware that some of the material, that constituted the *Sunnah* was originally the arbitrary opinions of the early generations something he off course fought against (Shāfiʿī, 1979: 106-109). ʿAbū Zayd makes a valid point when he says that Shāfiʿī distinguished between Qurʿān and *Sunnah* from the perspective of *naskh* i.e. Qurʿān does not abrogate *Sunnah* nor does *Sunnah* abrogate Qurʿān to preempt those who rejected *ḥadīths* that conflicted with the Qurʿān (ʿAbū Zayd, 1996: 92).

Conclusions

Whether one agrees with Shāfi‘ī or not, he undoubtedly made an important intellectual contribution to Islamic jurisprudence with an originality and richness of thought, in a way that no other scholar of his age did. In his analysis and depth of work, he ranks with Socrates, Descartes, Hegel and Marx. He not only interpreted his world, he transformed it and radically so - something Marx lamented that [most] philosophers never do.⁴ Shāfi‘ī challenged a tradition, exposed its incoherency, and refuted the arbitrary manner in which it conducted the interpretation of law. His concern was to save, albeit conceptually, the Prophetic *Sunnah* by defining in the *Risālah* its role in law and establishing the methods of reasoning and interpretation by which the law could further be deduced.

His role and contribution was however elevated by medieval and modern Islam. Therefore Ḥallāq has challenged the notion that Shāfi‘ī is the founder of a legal theory proper, in other words of *uṣūl al-fiqh* (Ḥallāq, 1997: 30-35). In 1993 he published an article entitled: *Was Al-Shāfi‘ī the Master Architect of Islamic Jurisprudence*, in which he dismissed the idea that Shāfi‘ī was the father of Muslim jurisprudence and that there is continuity between his theory

⁴ For example on reading *Al-Umm* - more precisely volume seven - one is struck by its resemblance to Socrates' questions style form of intellectual dialogue. Shāfi‘ī too engaged his interlocutor through questioning and in this manner exposed the latter's contradictions in his argument. The difference is that he, unlike Socrates, does not say: "the only thing I know is that I know nothing" Shāfi‘ī can and does say: "I know" on the basis of Qur'ān and *Sunnah* and *ijtihād* under the aegis of these two sources.

and classical *uṣūl al-fiqh* (Ḥallāq, 1994: 587-601).⁵ Lowry challenges and refutes, what had come to be accepted viz. that Shāfi‘ī has a theory of four sources of law i.e. Qur’ān, *Sunnah*, *ijmā‘* and *qiyās* in that descending order (Lowry, 2002: 23-50).

Certainly, Shāfi‘ī’s discourse has contradictions, contradictions for which he is partly responsible. However, I hasten to make an excuse on his behalf. The living *Sunnah*, in essence, a politically propelled tradition. Had not only bequeathed its tremendous political excesses – there were of course many revolutionary and moral decisions taken and arbitrary administrative innovations, but also had placed a stamp of divinity on some of these opinions and interpretations to the exclusion of others.

Shāfi‘ī was a child of the social-religious context into which he was born and developed intellectually. He was part of a tradition and he had inherited a legacy. In this sense he was a product of his society meaning that his social existence influenced, though not determined, his consciousness.⁶ The *ḥadīth* movement with its *isnād* analysis methodology, which became an important

⁵ This point emphasises the point made earlier in this thesis (see page 7) as argued by Ḥallāq, that Shāfi‘ī *al-Risalah* was not accepted throughout the third/ninth century and thus had little, if any impact, on juristic circles and what could still be termed early jurisprudence. Lowry rejects Ḥallāq’s thesis saying that Ḥallāq bases his view on the reception of the *Risalah* during the third/ninth century and not its content per se.

⁶ This is a Marxist idea that consciousness, as a product of materialism (unlike Hegel’s idealism), is determined by social existence and consciousness that determines social existence. It makes sense to say that society has an influence on consciousness and plays a role in its shaping (individual and collective); to claim, however, that society determines consciousness in totality is wrong. If this statement of Marx was correct than Marx could not have been the historic Marx who not only interpreted the world in various ways but who

instrument in his *bayān*, did not allow for a critique of *ḥadīth* materials beyond its framework. Whether Shāfi‘ī meets with approval or disdain he will for a long time remain both a source and object of academic inquiry and discourses.

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changed it with his consciousness that analysed and challenged the 19th century European social existence.

Conclusion

In my thesis I have attempted to highlight the arbitrary nature of the living *Sunnah* and that it was an exercise that was dictated to by a politicized rationality. It does not in any way claim or advocate that the scholarly element of that tradition was merely a rubberstamp of the political authority. However it is clear that the scholars – of the living *Sunnah* era and beyond - did not get to exercise authority, intellectual that is, as freely and as naturally as they ought to, or would, have wished to.

I concretised my critique with the thoughts of Mabruk, Fazlur Raḥmān, ‘Abd al-Majīd al-Ṣaghīr, Naṣr Ḥāmid ṢAbū Zayd and the works by scholars of Western Islamic Studies (Hallāq, Lowry, and Schacht etc.). My methodology was to select and eliminate, in other words whilst I benefited from their methodologies I applied it where I saw it proving my thesis and rejected what I saw as their errors. For example whilst I agree and accept al-Ṣaghīr’s notion that the scholars had authority I reject what I think to be his romanticizing and exaggeration of a notion that their authority rivalled the power of the rulers. I think Mabruk is correct in his identifying politics (*Imāmah*) as the prime mover of Muslim religious discourse, however, I think him too politically reductionist for the legacy of law and theology was not entirely the result of politics and its power games.

I partly accept the Mabruk - Raḥmān ṢAbū Zayd thesis that the human intellect in terms of creativity and progressiveness was sacrificed at the altar of Shāfi‘ī’s quest to establish the position of the Prophetic *Sunnah* as exclusive authority next to the Qur’ān. But I qualified what I

regarded, and hence rejected, as their rather unqualified and ideologically informed appraisal of Shāfi'ī and his *bayān* scheme. To me Shāfi'ī is not anti-rational in his defining of the role of the Prophetic *Sunnah* in law rather it is his usage of hermeneutical tools that clearly smacks of anti-rationalism. His aim for uniformity was primarily to put a stop to the excesses of the living *Sunnah* – wherein he achieved measured success - however, he failed in scrutinizing the content of the materials which were to a great extent the product of the very legacy he condemned – it became the materials from which he reconstructed the content of the Prophetic *Sunnah*. He was never fundamentally anti-rational nor did he intentionally aim at destroying creativity.

It was my intended aim in doing a critique of Raḥmān to expose his romanticism; a romanticism that, in my view, made him to read the early generations as a fairy tale world where legal genius and master application of situational interpretation were the natural order. Problems (intellectual decline, religious messianism etc.) only started after the first 3 generations when that man called Shāfi'ī let the demons loose. He ate from the forbidden tree of stability, at the devils (in 'Abū Zayd's reading the political authority whom Shāfi'ī willingly co-operated) advice, in search of uniformity, and we were expelled from the *jannah* of free-interpretation and progressive rationality. A progressive and genuine intellectual tradition will only be realized if we retrieve Aladdin's lamp of rationality, from the wizard (Shāfi'ī) and his charming spirit (the *bayān*), and illuminate it with the light of situational interpretation and free-thinking activity. It is thus an arduous journey back to Eden.

This study should not be viewed as anti-rational. If anything, by simply describing and critically evaluating the rationalism of the living *Sunnah* era and what it bequeathed to subsequent

generations, it insists on a rethinking and therefore a transformation of our intellectual tradition. And that is what this study is, a critical description and nothing more. In light of this last statement it ought to be clear that it did not present any solutions, not in itself (it is unable to do so) neither in accordance to a particular discourse, in order to preserve and transform the Islamic Cultural legacy.

It should also not be interpreted as an unqualified support for Shāfi'ī's *bayān*. Nor should it be read as an outright rejection of Raḥmān's notion; rather it appreciates Raḥmān's message that in essence calls for progressive interpretation and making the moral élan of Islam relevant to existential concerns. However it finds Raḥmān's methodology, rather the methodology that he extols i.e. the living *Sunnah* at odds with that enlightened message as articulated in his work *Islamic Methodology in History* but more specifically and clearly in his last published work in his lifetime (1982) *Islam and Modernity* – his last work published posthumously was edited by Ebrahim Moosa. It simply asks for – and it is here lies its supports for Shāfi'ī in principle – for coherency that would ensure that the basic élan of the Qur'ānic *weltanschauung* is not compromised in any undefined endeavour of interpretation and free-thinking. Here, I think that Raḥmān would fully agree with me. This I understand is what he means when he says that we have to embrace both the essence and the form of Islam.

As ʿIbrāhīm Mūsā says, modern Muslim thinkers are challenged not only to be innovative, but are simultaneously required to engage with tradition. In the words of the poet-philosopher Muḥammad Iqbāl the modern Muslim has to rethink the whole system of Islam without completely breaking with the past. In this way the modern Muslim will show his or her

awareness of the debt that he or she owes to the hereditary intellectual tradition, as well as to the tradition in the making: the ongoing and unfolding knowledge-making (discursive) tradition (Mūsā, 2003). By emphasizing the role of politics in that tradition it advocates ‘Alī Mabruk’s idea, that for effective – and progressive - interpretation of revelation that is constantly reproduced in history to be achieved, it must take place within an epistemological paradigm that is far removed from politics. The Arab-Muslim world can only emerge from the abyss it currently finds itself in if and when its scholars (those religiously educated and those academics not formerly schooled in the religious disciplines) engender a commitment and passion for rigorous intellectual transformation – and transcend their ideological inhibitions in that important task.

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