An Introduction to Islamic Law

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1 Who's who in the Shariʿa

In modern legal systems, judges, lawyers and notaries are unquestionably products of the legal profession. They are initially educated in elementary and secondary schools that are regulated by the state, and their education in the law schools from which they eventually graduate is no less subject to such regulation. They study the laws that the state legislates, although in some legal systems they also study the legal decisions of judges who are constrained in good part by the general policies of the state. The point is that the legal profession is heavily regulated by the state and its legal and public policies. It is difficult to think of any legal professional who can go on to practice law without having to pass some sort of exam that is directly or indirectly ordained by the state or its agencies. And when law students become lawyers, and lawyers become judges, their ultimate and almost exclusive reference is to law made by the state.

This situation would have been inconceivable in Muslim lands before the dawn of modernity. The most striking fact about traditional Islamic legal personnel is that they were not subject to the authority of the state, simply because the state as we now know it did not exist (in fact it did not exist in Europe either, its beginnings there going back to no earlier than the sixteenth century). Thus, until the introduction to the Muslim world – during the nineteenth century – of the modern state and its ubiquitous institutions, Muslims lived under a different conception and practice of government. (This is why we must not use the term "state" to refer to that early form of rule under which Muslims lived prior to the nineteenth century. Instead, we will reserve for that kind of authority such terms as "ruler," "rule" or "government.")

Pre-modern Muslim rule was limited in that it did not possess the pervasive powers of the modern state. Bureaucracy and state administration were thin, mostly limited to urban sites, and largely confined to matters such as the army of the ruler, his assistants, tax collection and often land tenure. People were not registered at birth, had no citizenship status, and could travel and move to other lands and regions freely – there being no borders, no passports, no nationalities, and no geographic fixity

to residential status. A Cairene family, for instance, could migrate to Baghdad without having to apply for immigration, and without having to show documentation at borders, because, as I said, there were neither borders (not fixed at any rate) nor passports in the first place. And the farther people lived from the center of rule, the less they were affected by the ruler, his armies and his will to impose a certain order or even taxes on them. And the reason for this was simple: in order for the ruler to have complete control over far-away regions, he had to send armies and government officials whose cost of maintenance may not always have been covered by the taxes they levied from the populations under their control.

So, if there was no *state* to regulate society and the problems that arose in it, then how did people manage their affairs? The short answer is: self-rule. Communities, whether living in city quarters or villages, regulated their own affairs. If the civil populations felt it necessary to have a ruler, it was because of the specific need for protection against external enemies, be they raiding tribes, organized highway robbers or foreign armies who might wreak violence on them and play havoc with their lives. But the civil populations did not need the ruler to regulate their own, internal affairs, since such regulations were afforded by a variety of internal mechanisms developed over centuries by their own local communities. Customary law was an obvious source of self-regulation, but the Sharʿia was equally as important.

This is to say that the Sharʿia was not the product of Islamic government (unlike modern law, which is significantly the product of the state). It is true that the Muslim ruler administered justice by appointing and dismissing JUDGES, even defining the limits of their jurisdictions, but he could in no way influence how and what law should apply. So the question before us is: if the Muslim ruler did not create the law of the land, who did?

The answer is that society and its communities produced their own legal experts, persons who were qualified to fulfill a variety of functions that, in totality, made up the Islamic legal system. For now, we will speak – in a limited fashion and by way of an introduction – of four types of legal personnel who played fundamental roles in the construction, elaboration and continued operation of the Shariʿa. These are the *MUFTI*, the AUTHOR-JURIST, the judge and the law professor. Of course there were other "players" in the legal system, including the notaries, the court witnesses and even the ruler himself (to be discussed in due course), but their role in the construction of the system and its continuing operation was not "structural" (by which I mean that the system would have remained much the same with or without their participation). But without the fundamental contributions of *mufti*, author-jurist, judge and law professor, the Shariʿa would not have had its unique features and would not

have developed the way it did. These four players, each in his own way, made the Shari'a what it was.

We begin with the *mufti* because of his central role in the early evolution of Islamic law and his important contribution to its continued flourishing and adaptability throughout the centuries. The *mufti*, performing a central function, was a private legal specialist who was legally and morally responsible to the society in which he lived, not to the ruler and his interests. The *mufti*'s business was to issue a *FATWA*, namely, a legal answer to a question he was asked to address. As a rule, consulting him was free of charge, which means that legal counsel was easily accessible to all people, poor or rich. Questions addressed to the *mufti* were raised by members of the community as well as by judges who found some of the cases brought before their courts difficult to decide. The first legal elaborations that appeared in Islam were the product of this question/answer activity. With time, these answers were brought together, augmented, systematized and eventually transmitted in memory as well as in writing as "law books."

The *mufti* stated what the law was with regard to a particular factual situation. As he was – because of his erudition – considered to have supreme legal authority, his OPINION, though non-binding, nonetheless settled many disputes in the courts of law. Thus regarded as an authoritative statement of law, the *fatwa* was routinely upheld and applied in the courts. A disputant who failed to receive a *fatwa* in his or her favor was not likely to proceed to court, and would instead abandon his or her claim altogether or opt for informal MEDIATION.

*Mufti*s did not always "sit" in court, but this did not change the fact that they were routinely consulted on difficult cases, even if they resided at several days' distance from where the case was being decided. It was not unusual that a judge, say in Cairo, would send a letter containing a question to a *mufti* who lived, for instance, in Muslim Spain.

The authority of the *fatwa* was decisive. When on occasion a *fatwa* was disregarded, it was usually because another *fatwa*, often produced by an opponent, constituted a more convincing and better-reasoned opinion. In other words, and to put it conversely, it was rare for a judge to dismiss a *fatwa* in favor of his own opinion, unless he himself happened to be of a juristic caliber higher than that enjoyed by the *mufti* from whom the *fatwa* was solicited (in which case the judge himself would not seek a *fatwa* in the first place). All this is to say that the *fatwa* is the product of legal expertise and advanced legal knowledge, and the more learned the *mufti*, the more authoritative and acceptable his *fatwa* was to both the court and the public. (The level of a scholar's legal knowledge was determined through practice, not degrees or diplomas. The measure of a leading jurist was,

among other things, the quality of his writings and *fatwa*s as well as his ability to win in scholarly debates with distinguished scholars.)

The central role of the *fatwa* in the Muslim court of law explains why the decisions of judges were neither kept nor published in the manner practiced by modern courts. In other words, law was to be found not in precedent established by courts of law (a notion based on the doctrine of *STARE DECISIS*), but rather in a juristic body of writings that originated mostly in the answers given by *mufti*s.

Thus, emanating from the world of legal practice, the *fatwa*s rather than court decisions were collected and published, particularly those among them that contained new law or represented new legal elaborations on older problems that continued to be of recurrent relevance. Such *fatwa*s usually underwent a significant editorial process in which legally irrelevant facts and personal details (e.g., proper names, names of places, dates, etc.) were omitted. Moreover, they were abridged with a view to abstracting their contents into strictly legal formulas, usually of the hypothetical type: "If X does Y under a certain set of conditions, then L (LEGAL NORM) follows." Once edited and abstracted, these *fatwa*s became part and parcel of the authoritative legal literature, to be referred to and applied as the situation required.

The great majority of Islamic legal works, however, were written not by the *mufti*, but rather by the author-jurists who depended in good part on the *fatwa*s of distinguished *mufti*s. The author-jurists' activity extended from writing short but specialized treatises to compiling longer works, which were usually expanded commentaries on the short works. Thus, a short treatise summing up the law in its full range usually came to about two hundred pages, and often elicited commentaries occupying as many as ten, twenty or thirty large volumes. It was these works that afforded the author-jurists the opportunity to articulate, each for his own generation, a modified body of law that reflected both evolving social conditions and the state of the art in the law as a technical discipline. The overriding concern of the author-jurists was the incorporation of points of law (for the most part *fatwa*s) that had become relevant and necessary to the age in which they were writing. This is evidenced in their untiring insistence on the necessity of including in their works "much needed legal issues," deemed to be relevant to contemporary exigencies as well as those issues of "widespread occurrence."[1] On the other hand, cases that had become irrelevant to the community and its needs, and having thus gone out of circulation, were excluded. Many, if not the majority, of the cases retained were

[1] Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 188–89.

acknowledged as belonging to the "later jurisprudents" who had elaborated them in response to the emerging new problems in the community. Reflecting in their writings the "changing conditions of people and of the age,"[2] the author-jurists opted for later opinions that were often at variance with the doctrines of the early masters. It is also instructive that the *fatwa*s that formed the substance of later doctrine were those that answered contemporary needs and had at once gained currency in practice. On the other hand, those opinions that had ceased to be of use in litigation were excluded as weak or even irregular.

Many of the works written and "published" by the author-jurists served as standard references for judges, who studied them when they were students and consulted them after being appointed to the judiciary. Hence, if the authority of the law resided in the *mufti*'s opinions and the author-jurist's treatises, then the judge – unless he himself was simultaneously a *mufti* and/or an author-jurist – was not expected to possess the same level of expert legal knowledge. This is to say that a person who was a *mufti* or an author-jurist could usually function as a judge, although a judge who was trained only as a judge could serve neither in the capacity of a *mufti* nor in that of an author-jurist.

It is obvious that the business of a judge is to adjudicate disputes, which is indeed the chief task of a modern judge. But this task was only one of many other important duties that the Muslim judge, the *QADI*, had to undertake. The *qadi*, like the *mufti*, was a member of the community he served. In fact, Islamic law itself insists that a *qadi*, to qualify for the position, has to be intimately familiar with the local customs and way of life in the community in which he serves. With the help of his staff, which we will briefly discuss in due course, he was in charge of supervising much in the life of the community. He oversaw the building of mosques, streets, public fountains and bridges. He inspected newly constructed buildings and the operation of hospitals and soup-kitchens, and audited, among other things, the all important CHARITABLE ENDOWMENTS. He looked into the care afforded by guardians to orphans and the poor, and himself acted as guardian in marriages of women who had no male relatives. Moreover, the *qadi* oftentimes played the exclusive role of mediator in cases that were not of a strictly legal nature. Not only did he mediate and arbitrate disputes and effect reconciliations between husbands and wives, but he also listened, for example, to the problems dividing brothers who might need no more than an outsider's opinion.

[2] *Ibid*.

Furthermore, the Muslim court was the site in which important transactions between individuals were recorded, such as the sale of a house, the details of the estate of a person who had died, or a partnership contract concluded between two merchants. At times a person might approach the court merely to request that it take note of an insult directed at him or her by another, this being equivalent to building a "history" in the event a future dispute erupted with that person.

Equally important was the social site in which the *qadi* and his court functioned. Judges invariably sought to understand the wider social context of the litigating parties, often attempting to resolve conflicts in full consideration of the present and future social relationships of the disputants. Like mediators, but unlike modern judges, the *qadi*s tried hard, wherever possible, to prevent the collapse of relationships so as to maintain a social reality in which the litigating parties, who often came from the same community, could continue to live together amicably. Such a *judicial* act required the *qadi* to be familiar with, and willing to investigate, the history of relations (and relationships) between the disputants.

Finally, we must say a few words about the law professor. The beginnings of legal education in Islam can in fact be traced back to the *mufti*s who emerged during the last two or three decades of the seventh century as private specialists in the law. They did not have salaries and their interest in the study of law was motivated by piety and religious learning. Around each of these early *mufti*s gathered a number of students – and sometimes the intellectually curious – who were interested in gaining knowledge of the Quran and the biography of the Prophet Muhammad as an exemplary standard of conduct. These gatherings usually took place in the new mosques that were built in the various cities and towns that had come under the rule of Islam. Following the practice of Arab tribal councils when they assembled to discuss important issues, these scholarly gatherings took the form of CIRCLES, where the *mufti*/professor would literally sit on the ground, legs crossed, having students and interested persons sit to his left and right in a circular fashion. (This was also the physical form that court sessions took.) Students did not have to apply formally to study with a professor, although his informal approval to have them join his circle was generally required – as was proper decorum on the part of the student. There were no fees to be paid, except the occasional gift the professor might have received from students or their family members. There were no diplomas or degrees conferred upon graduation, only a license issued by the professor attesting that the student had completed the study of a book that he in turn could transmit or teach to others. The license was personal, having the authority of the professor himself, not that of an impersonal institution (as are the degrees granted by today's universities).

During the first two centuries of Islam, the distinction between a *fatwa* assembly and a teaching circle was not always clear-cut or obvious. In fact, to some extent, this situation continued to obtain even throughout the later centuries when a *mufti* sitting in a circle would announce the end of a *fatwa* session, would open another session for adjudicating cases – thus acting as a judge – and perhaps in the afternoon (at times after sharing a meal with his students) would set up yet another circle for teaching. (We often read in the sources that many JURISTS wrote their legal treatises during the night hours – and in seclusion – thereby acting in the capacity of author-jurists. It must be said that those who acted in all four capacities were usually regarded as among the most accomplished jurists.)

Some *fatwa*s encountered in a *fatwa* session might be discussed in the teaching circle, while some students who participated in the teaching or *fatwa* circle might act as witnesses when the circle was transformed into a court session. Thus, while these three activities or spheres were different from each other, they were interrelated in several ways, at both the level of student participation and that of professor. If a person could act as a *mufti*, then he could teach, and was certainly qualified to perform the duties of a judge (provided, of course, that he had been appointed as *qadi* by the ruler or governor).

Judges, as government appointees, were financially remunerated by the ruler for their work, but not so *mufti*s or professors (with the partial exception of later OTTOMAN practice, which we will discuss in due course). Still, during the first four or five centuries of Islam, even judges did not hold such appointments full-time, and when they did not, had to find, like *mufti*s and professors, other sources of income. This is to say that until the legal profession was institutionalized, the jurists of Islam were not, in terms of gaining a livelihood, full-time legal professionals, however learned and skilled in the law they were. Thus, until the eleventh or twelfth century, the vast majority of jurists held other jobs, with many of them working as tanners, tailors, coppersmiths, copiers of manuscripts, and small merchants and traders. In other words, they generally belonged to what we call today the lower and middle, rather than the upper classes.

2 The Law: how is it found?

Introduction

The question that we need to address briefly at this point is: How did the *mufti*s and author-jurists derive the law from its sources? What, in other words, were the interpretive means and methods of reasoning through which the law was inferred? Before we proceed, however, an important point must be made.

Since the first century of Islam, Muslim legal thinking has had to wrestle with the problem of the extent to which human reason can guide humankind in conducting its material and spiritual affairs. Some philosophers thought that the leading intellectuals might be able to exercise their rational faculties in order to judge what is good and what is bad in the way we deal with each other as social beings, and with the natural world around us. They may know, thanks to their trained intellects, that a certain code of morality or a set of particular laws is *rationally* required for the orderly and civil functioning of society. They may even understand – given that they have all the facts at hand – that the natural environment around us must not be abused and that we are an integral part of this natural order. Damage that and we damage ourselves in the process.

Yet law is not relevant only to intellectuals, since it is essential to society at large, i.e., to the uneducated man or woman as much as to the highly learned. How can ordinary people come to understand the need to abide by certain patterns of conduct if they do not possess the means to think through life's intricate situations or the world's more complex problems? How can even the elite intellectuals determine the exact way in which we should behave properly? Thus, Islamic law and theology posed the central question: Does rational thinking, *on its own*, accomplish the job? Or, to put it differently, is rational thinking – even in its best forms – sufficient for Muslims to know precisely how to conduct themselves in their worldly and religious affairs? (To bring this point into sharp relief, and to continue with the aforementioned example about the natural

order, one might consider that our best rational and scientific thinking has led us – during the last century or so – to the virtual destruction of our natural environment.)

The Muslim jurists and most Muslim theologians held the view that rational thinking is a gift from God and that we should fully utilize it – like everything else that He bestowed on us – in as wise and responsible a manner as possible. Just as His material blessings (the wealth some of us have come to possess) must be deployed for good works, our intellects must likewise be exercised for good causes. But what are these good works and causes? What is their *content*? If God granted us precious intellects, by what measure do we think about the world, about its human, material and physical components? In other words, how do we determine what is good and what is evil, what is beneficial and what is harmful in both the short and long runs? In yet other words, it is not only precisely *how* we think but also, and equally important, *what substantive assumptions* must we make when exercising our processes of thought? For example, the content of our modern rationalist thinking about the natural environment may be our immediate concern with material welfare and physical comfort (leading, among other things, to heavy industrialization), but the consequences of this thinking and the ensuing actions could well lead us to an environmental disaster. On the other hand, if the positive content of our rationalist thinking were to be, say, the integrity of the natural order (as, for example, Buddhism teaches), then our conclusions and therefore resultant actions and effects would be entirely different, despite the fact that nothing in our rationalist methods *themselves* has changed. It was precisely this dilemma that Muslims encountered virtually from the beginning of their religion. And their solution was, as it continued to be for centuries, that, however precious, *rationalist thought on its own is insufficient*.

Islamic legal tradition adopted the position that, while our reason is to be exercised to its fullest capacity, the *content* of rational thinking must be predetermined, transcendental and above and beyond what we can infer through our mental faculties. Implied in this thinking was the assumption that humans simply do not understand all the secrets of the world, so that attempting to control it is to be vain and arrogant. God is the One who created the world and therefore the One who knows its secrets. We may exercise our intellects to their fullest capacity, but without His aid, we will overlook and misunderstand much. The content of rationality, in their thinking, must thus be predetermined by the all-knowing God, who has revealed a particular body of knowledge through the Quran and the Prophet. This combination, viewed as a marriage between reason and revelation, was the ultimate source of law. Law, put differently, was the child of this marriage.

Transmission of texts

With this background in mind, Muslim jurists proceeded to articulate a theory of law (*USUL AL-FIQH*) that reflected the concerns and goals of this "marriage." The theory began with the assumption that the Quran is the most sacred source of law, embodying knowledge that God had revealed about human beliefs, about God himself, and about how the believer should conduct himself or herself in this world. This human conduct was the domain of law, and to this end the Quran contained the so-called "legal verses," some five hundred in all (the others being theological, exhortative, etc.).

But God also sent down a prophet, called Muhammad, whose personal conduct was exemplary. Though not, according to Muslim tradition, endowed with divine qualities (as Jesus Christ is said to have been by Christians), Muhammad was God's chosen messenger; he understood God's intentions better than anyone else, and acted upon them in his daily life. Hence the exemplary nature of his biography, which became known in the legal literature as SUNNA – the second major source of law after the Quran. The concrete details of the Sunna – that is, what the Prophet had done or said, or even tacitly approved – took the form of specific narratives that became known as *HADITH* (at once a collective and a singular noun, referring to the body of *hadith* in general and to a single *hadith*, according to context). For example, the Sunna of the Prophet generally promotes the right to private property, but the precise nature of this right was not made clear until the pertinent *hadith*s became known. Thus, we learn in one such *hadith* that when the Prophet once heard that someone had cultivated plants on the land of his neighbor without the latter's knowledge, he said: "He who plants, without permission, in a lot owned by other people cannot own the crops although he is entitled to a wage [for his labor]." In the context of property rights, he also said: "He who unlawfully appropriates as much as one foot of land [from another], God will make seven pieces of land collapse on him when the Day of Judgment arrives." These two *hadith*s, along with many others, give a good idea of what the Prophetic Sunna – as an abstract concept – aims to accomplish in the vital area of property law.

One of the concerns of legal theory was to provide criteria by which the subject matter of the *hadith*s (which, in their entirety, exceeded half a million) might be transmitted from one generation to the next in a reliable manner. The application of these criteria finally resulted in the acceptance of only about 5,000 sound *hadith*s. Thus, a *hadith* that had been passed down via a defective or interrupted chain of transmitters, or by transmitters known to be untrustworthy, was held to lack any legal effect even

though its language might be clear and unequivocal. For example, if I know that a *hadith* was transmitted to me from A, B, C, D and F on the authority of the Prophet, but the identity of E is unknown to me or, alternatively, I know him to have been untrustworthy, then I cannot use the *hadith* for reasoning about the law. If the *hadith* passes the test of sound transmission but consists of ambiguous words whose exact meaning I am unable to determine with any precision, then the *hadith* is also rendered useless as the basis of legal reasoning.

Even the Quran contains such ambiguous language, but in terms of transmission it is regarded as *wholly certain*, since the entire community of Muslims was involved in its conveyance from one generation to the next. This position stems from the theory of CONSENSUS, namely, that it is inconceivable for the entire Muslim community to conspire on a falsehood, including forging or distorting the holy Book. Thus, for a text to be deemed credible beyond a shadow of doubt (i.e., to have certainty), it must meet this requirement of multiple transmission, which we will here call RECURRENCE. For recurrence to obtain, three conditions must be met: first, the text must be conveyed from one generation to the next through channels of transmission sufficiently numerous as to preclude any possibility of error or collaboration on a forgery; second, the first class of transmitters must have had sensory perception of what the Prophet said or did; and third, the first two conditions must be met at each stage of transmission, beginning with the first class and ending with the last narrators of the report.

Any text transmitted through channels fewer than those by which the recurrent report is conveyed is termed SOLITARY, although the actual number of channels can be two, three or even more. With the possible exception of a few, the *hadith* reports are generally considered solitary, and, unlike the Quranic text, they do not possess the advantage of recurrence. In fact, there were far more fabricated, and thus weak, *hadith*s than there were sound ones. But even these latter did not always engender certainty, since most were of the solitary type and therefore yielded only probable knowledge. If all this points to anything about Islamic law, it is its own acknowledgment that, as a practical field, religious law (mostly *hadith*-derivative) does not have to enjoy certainty. Certainty is necessary only when the issue at stake is either the status of one of the law's FOUR SOURCES or a higher order of belief, such as the existence of God himself. As a system of belief and practice, the law on the whole cannot be considered legitimate or meaningful if one or more of its sources rests on probable, and thus uncertain, foundations; or if God himself, the originator of the Law, is not known to exist with certainty.

As we intimated earlier, the trustworthiness of individual transmitters played an important role in the evaluation of *hadiths*. The attribute that

was most valued, and in fact deemed indispensable and determinative, was that of being just, i.e., being morally and religiously righteous. A just character also implied the attribute of being truthful, which made one incapable of lying. This requirement was intended to preclude either outright tampering with the wording of the transmitted text, or interpolating it with fabricated material. It also implied that the transmitter could not have lied regarding his sources by fabricating a chain of transmitters, or claiming that he had heard the *hadith* from an authority when in fact he had not. He had also to be fully cognizant of the material he related, so as to transmit it with precision. Finally, he must not have been involved in dubious or "sectarian" religious movements, for if this were the case, he would have been liable to produce heretical material advancing the cause of the movement to which he belonged. This last requirement clearly suggests that the transmitter must have been known to be loyal to Sunnism, to the exclusion of any other community. The TWELVER-SHIʿIS had a similar requirement.

Transmitters were also judged by their ability to transmit *hadith*s verbatim, for thematic transmission ran the risk of changing the wording, and thus the original intent, of a particular *hadith*. Furthermore, it was deemed preferable that the *hadith* be transmitted in full, although transmitting one part, thematically unrelated to the rest, was acceptable.

The jurist may encounter more than one *hadith* relevant to the case he is trying to solve, or *hadith*s that may be contradictory or inconsistent with one another. If he cannot reconcile them, he must seek to make one *hadith* preponderant over another by establishing that the former possesses attributes superior to, or lacking in, the latter. The criteria of preponderance depend on the mode of transmission as well as on the subject matter of the *hadith* in question. For example, a *hadith* transmitted by mature persons known for their prodigious ability to retain information is superior to another transmitted by young narrators who may not be particularly known for their memory or precision in reporting. Similarly, a *hadith* whose first transmitter was close to the Prophet and knew him intimately is regarded as superior to another whose first transmitter was not on close terms with the Prophet. The subject matter also determines the comparative strength or weakness of a *hadith*. For instance, a *hadith* that finds thematic corroboration in the Quran would be deemed more weighty than another which finds no such support. But if the procedure of weighing the two *hadith*s does not result in tipping the balance in favor of one against the other, the jurist may also resort to the procedure of ABROGATION, whereby one of the *hadith*s is made to repeal, and thus cancel out the effects of, another.

Abrogation was also unanimously held as one of the key methods of dealing with contradictory Quranic texts. But the theory of Abrogation

does not imply that the Quranic passages themselves are actually abrogated – only the legal rulings embedded in these passages.

The fundamental principle of Abrogation is that one text repeals another contradictory text that was revealed prior to it in time. But abrogation may result from a clearer consideration, especially when the text itself stipulates that another should be superseded. An example in point is the Prophet's statement: "I had permitted for you the use of the carrion leather, but upon receipt of this writing [epistle], you are not to utilize it in any manner." Yet another consideration is the consensus of the community as represented by its scholars. If one ruling is adopted in preference to another, then the latter is deemed abrogated, since the community cannot agree on an error.

That the Quran can abrogate *hadith*s is evident, considering its distinguished religious stature and the manner of its transmission. And it is understandable why solitary *hadith*s cannot abrogate Quranic verses (although a tiny minority of jurists permitted this type of abrogation). However, the question that remained controversial was whether or not recurrent *hadith*s could abrogate Quranic verses.

Reasoning

Be that as it may, the language of the Quran and *hadith* was not always clear and unequivocal. That is, some terms lent themselves to more than one interpretation. Metaphorical words and overly general language had to be interpreted to yield specific meanings and, to do so, the jurists developed linguistic rules in order to resolve such problems.

The aim of the reasoning jurist was to establish, for every new case he encountered, a legal norm. The Shariʿa recognizes five such norms, intended to order the entire range of human activity and to set human life in good order. The purpose here is not to control or discipline, the two most salient tasks of modern law and the modern state that wields it. Rather, in Muslim thinking, the purpose of the law is to foster living in peace, first with oneself, and second with and in society. The law bids one to do the right thing, to the extent one can and wherever one happens to be. The state permits and forbids, and when it does the latter, it punishes severely upon infraction. It is not in the least interested in what individuals do outside of its spheres of influence and concern. Islamic law, on the other hand, has an all-encompassing interest in human acts. It organizes them into various categories ranging from the moral to the legal, without however making conscious distinctions between the moral and the legal. In fact, there are no words in Arabic, the *lingua franca* of the law, for the different notions of moral/legal.

Thus, all acts are regarded as *shar'i* (i.e., subject to the regulation of the Shari'a *and therefore pronounced as law* – "*law*" being a moral-legal commandment), and are categorized according to five norms. The first of these is the category of the forbidden, which entails punishment upon commission of an act considered prohibited, whilst the second category, that of the obligatory, demands punishment upon omission of an act whose performance is regarded as necessary. Breach of contract and theft are infractions falling within the forbidden category, while prayer and payment of pecuniary debts are instances of the obligatory. Both categories require punishment upon non-compliance.

The three remaining categories are the recommended, neutral and disapproved. Helping the poor, consuming particular lawful foods and unilateral DIVORCE by the husband are, respectively, examples of these three categories. Performing the disapproved and not performing the recommended entail no punishment. But if a person is compliant, i.e., by performing a recommended act or refraining from a disapproved act, then he or she will be rewarded, although the reward is assumed to await one in the Hereafter. Since the category of the neutral prescribes neither permission nor prohibition, then neither reward nor punishment is involved.

Thus, when the reasoning jurist encounters in the Quran and/or the Sunna a word that has an imperative or a prohibitive form (e.g., "Do" or "Do not do"), he must decide to which of the five legal norms they belong. When someone commands another, telling him "Do this," should this command be regarded as falling only within the legal value of the obligatory, or could it also be within that of the recommended and/or the indifferent? The very definition of the imperative was itself open to wide disagreement. Some writers saw it as language demanding of a person that he or she perform a certain act. Others insisted that an element of superiority on the part of the requestor over the person ordered must be present for the expression to qualify as imperative; i.e., an inferior's language by which he commands his superior cannot be taken as imperative. Against the objection that one can command one's equal, they argued that such a command, though it may take the imperative form, is merely a metaphoric usage and should not be treated as a command in the real sense.

These varied interpretive positions do not seem to have offered a satisfactory or consistent solution to the problem of the imperative form. But by the eleventh century, some jurists had succeeded in resolving the issue. They pointed out that the significations of linguistic forms, including the imperative, must be understood in light of what has been established by convention, which is known by means of widespread usage of the

language. Through this pervasive usage, which cannot be falsified, we know from past authorities what the convention is with regard to the meaning of a word, or we know that the Lawgiver has accepted and confirmed the meaning as determined by that convention. Such reported usage also informs us of the existence of any consensus in the community on how these words are to be understood or, in the absence of a consensus, how they were understood by scholarly authorities whose erudition, rectitude and integrity would have prevented them from remaining silent when an error in language was committed.

So far, we have discussed the first two sources of the law: the Quran and the Sunna of the Prophet. We now turn to the third source, consensus, which guaranteed not only the infallibility of those legal rulings (or opinions) subject to juristic agreement but also the entire structure of the law. Technically, consensus is defined as the agreement of the community as represented by its highly learned jurists living in a particular age or generation, an agreement that bestows on those rulings or opinions subject to it a conclusive, certain knowledge.

The universal validity of consensus could not be justified by reason, since Muslims held that entire communities or "nations" could go, and indeed had gone, wrong even on important issues. Consensus, therefore, had to be grounded in the Quran and/or the Sunna. But early attempts by theoreticians to articulate a Quranic basis for consensus failed, since the Quran did not offer evidence bearing directly on it. No less disappointing were the recurrent Prophetic reports which contained virtually nothing to this effect. All that were available were solitary reports speaking of the impossibility of the community on the whole ever agreeing on an error. "My community shall never agree on a falsehood" and "He who departs from the community ever so slightly would be considered to have abandoned Islam" are fairly representative of the language employed. While a dozen or more of these reports were considered relevant to the issue of consensus's authority, they gave rise to a problem. Solitary reports are probable and thus cannot prove anything with certainty. Consensus is one of the sources of the law, and must as such be shown to have its basis in nothing short of certain evidence. Otherwise, the whole foundation of the law, and therefore religion, might be subject to doubt.

To solve this quandary, the jurists turned to the reports that are *thematically*, but not verbally, recurrent. Although solitary, these reports not only are numerous but, despite the variation in their wording, possess in common a single theme, namely, that through divine grace the community as a whole is safeguarded against error. The large number of transmissions, coupled with their leitmotif, transforms these reports into the *thematically* recurrent type, thus yielding certain knowledge of an infallible nature.

Conclusively established as a source of law, consensus ratifies as certain any particular rule that may have been based on probable textual evidence. The reasoning advanced in justification of this doctrine is that if consensus on probable evidence is attained, the evidence cannot be subject to error inasmuch as the community cannot err in the first place. Thus, consensus may be reached on rules that were based on inferential methods of reasoning. However, it is important to note that the cases or rules upon which there was consensus are limited, constituting less than 1 percent of the total body of law. Yet because these cases were subject to this extraordinary instrument, they were deemed especially important.

There remains the question of how consensus is determined to have occurred. Much theoretical discussion was devoted to this issue, but in practice knowledge of the existence of consensus on a particular case was determined by looking to the past and by observing that the major jurists were unanimous regarding its solution. And, as we have said, such cases were relatively few.

Knowledge of cases subject to consensus was required in order to ensure that the jurist's reasoning did not lead him to results different from, or contrary to, the established agreement in his school or among the larger community of jurists. The importance of this requirement stems from the fact that consensus bestows certainty upon the cases subject to it, raising them to the level of the unequivocal texts in the Quran and the recurrent *hadith*; thus, reopening such settled cases to new solutions would amount to questioning certainty, including conclusive texts in the Quran and the Sunna. Yet, as already noted, the cases determined to be subject to the certainty of consensus remained numerically insignificant as compared to those subject to juristic disagreement. The point remains, however, that inferential reasoning is legitimate only in two instances, namely, when the case in question had not been subject to consensus (having remained within the genre of juristic disagreement) or when it was entirely new.

The jurists recognized various types of legal reasoning, some subsumed under the general term *QIYAS*, and others dealt with under such headings as *ISTISLAH* (public interest) and *ISTIHSAN* (juristic preference). We begin with *qiyas*, considered the fourth source of law after consensus.

The characterization of this category as a "source of law" need not imply that it was a material source on the *substance* of which a jurist could draw. Instead, it is a source only insofar as it provides a set of methods *through* which the jurist arrives at legal norms. The most common and prominent of these methods is analogy. As the archetype of all legal argument, *qiyas* is seen to consist of four elements, namely: (1) the new case requiring a legal solution (i.e., the application of one of the five norms); (2) the original case

that may be found either stated in the revealed texts or sanctioned by consensus; (3) the *RATIO LEGIS*, or the attribute common to both the new and original cases; and (4) the legal norm that is found in the original case and that, owing to the similarity between the two cases, must be transposed to the new case. The archetypal example of legal analogy is the case of wine. If the jurist is faced with a case involving date-wine, requiring him to decide its status, he looks at the revealed texts only to find that grape-wine was explicitly prohibited by the Quran. The common denominator, the *ratio legis*, is the attribute of intoxication, in this case found in both drinks. The jurist concludes that, like grape-wine, date-wine is prohibited owing to its inebriating quality.

Of the four components of *qiyas*, the *ratio legis* occasioned both controversy and extensive analysis, since the claim for similarity between two things is the cornerstone and determinant of inference. Much discussion, therefore, was devoted to the determination of the *ratio*, for although it may be found to be explicitly stated in the texts, more often it is intimated or alluded to. Frequently, the need arose to infer it from the texts. For instance, when the Prophet was questioned about the legality of bartering ripe dates for unripe ones, he queried: "Do unripe dates lose weight upon drying out?" When he was answered in the affirmative, he reportedly remarked that such barter is unlawful. The *ratio* in this *hadith* was deemed explicit since prohibition was readily understood to be predicated upon the dried dates losing weight; hence, a transaction involving unequal amounts or weights of the same object would constitute USURY, clearly prohibited in Islamic law. In other instances, the *ratio* may be merely intimated. In one *hadith*, the Prophet said: "He who cultivates a barren land acquires ownership of it." Similarly, in 5:6, the Quran declares: "If you rise up for prayer, then you must wash." In these examples, the *ratio* is suggested in the semantic structure of this language, reducible to the conditional sentence "If …, then …" The consequent phrase "then …" indicates that the *ratio* behind washing is prayer, just as the ownership of barren land is confirmed by cultivating it. It is important to realize here that prayer requires washing, not that washing is consistently occasioned by prayer alone. For one can wash oneself without performing prayer, but not the other way round. The same is true of land ownership. A person can possess barren land without cultivating it, but the cultivation of it, and subsequent entitlement to it, is the point.

The *ratio* may consist of more than one attribute, all of which must be considered as "causing" a normative rule to arise from them. For instance, the *ratio* of the theft penalty encompasses five attributes: (1) the object stolen must have been taken away by stealth; (2) it must be of a minimum value; (3) it must in no way be the property of the thief; (4) it must be taken

out of custody; and (5) the thief must have full legal capacity. All of these attributes must obtain for an act to qualify as theft, an act punishable by cutting off the hand. All attributes must exist together; no single one by itself suffices to produce the *ratio legis*.

The rationale behind the rule is at times comprehensible: for example, the intoxicating attribute of wine renders it prohibited because intoxication incapacitates the mind and hinders, among other things, the performance of religious duties. In this example, we comprehend the reason for the prohibition. Some properties, however, do not disclose the reason. We do not know, for instance, why the quality of edibility should be the *ratio legis* for the prohibition of usury in the exchange of some goods; all we know is that no object possessing the property of edibility can be the subject of a transaction involving usury.

The *ratio* may also be causally connected with its rule in a less than explicit manner. From Quran 17:23, "Say not 'Fie' to them [parents] neither chide them, but speak to them graciously," the jurists understood that uttering "Fie" before one's parents is prohibited because of the lack of respect the expression entails. If the utterance of "Fie" is prohibited, then striking one's parents is *a fortiori* prohibited. The prohibition of striking is indirectly engendered by the prohibition against uttering "Fie," and is not explicitly stated in the texts. At times, the sequence of events may help unravel the *ratio*, for the sequence may be interpreted causally. The Prophet, for instance, tersely commanded a man to free a slave upon hearing that the man had engaged in sexual intercourse with his wife during the fasting hours of Ramadan. Although the connection between the infraction and the command was not made clear by the Prophet, the sequence of events nonetheless renders them causally so connected. The Prophet would not have behaved in this manner without the occurrence of a particular event that precipitated his particular command.

The *ratio legis* may also be known by consensus. For example, it is the universal agreement of the jurists that the father enjoys a free hand in managing and controlling the property of his minor children. Here, minority is the *ratio* for this unrestricted form of conduct, and property the new case. Thus, the *ratio* may be transposed to yet another new case, such as the unrestricted physical control of a father over his children.

A significant method for discovering and evaluating the *ratio* is that of SUITABILITY (*MUNASABA*). We have noted that the Quran prohibits the consumption of wine because it possesses the attribute of inebriation, leading the intoxicated person to neglect his religious duties. The theorists argued that even if the Quran did not allude to the reason for the prohibition, we would still come to understand that the prohibition was pronounced because of inebriation's harmful consequences. This is

reasoning on the basis of suitability, since we, independently of revelation and through our rational faculty, are able to recognize the harmful effects of intoxication and thus the rationale behind certain sorts of prohibition.

However, there are limits to rationality within and without the method of suitability. Since the law cannot always be analyzed and comprehended in (exclusively) rational ways, reason and its products are not always in agreement with the legal premises and their conclusions. Suitability, therefore, may at times be relevant to the law, and irrelevant at others. No *ratio* may be deemed suitable without being relevant, and any irrelevant *ratio* becomes unsuitable, precluding it from further juristic consideration. In the case of divorced women who are of the age of majority, male guardianship is waved by virtue of the life experience that such divorcees have gained. Thus, such divorcees may remarry without the need for a guardian's approval. Logically, this reasoning would apply to divorcees who are minor, but rationally this is inappropriate since it runs counter to the aims of the law in protecting the welfare and interests of minors.

Suitability's goal is to offer "relevant" ways of reasoning that serve the public interest (*MASLAHA*) as defined by the fundamental principles of the law. In other words, interpreting the law in the light of suitability is accomplished independently of the specific revealed texts, since the *ratio* is not, in the first place, textual. Rather, it is rational and seeks to conform to the spirit of the law, which is known to prohibit what is harmful and to promote what is good for this life and for the hereafter. The systematic exclusion of harm and inclusion of benefit are the fundamental aims of the law, and it is to these aims that the rational argument of suitability must conform. Protection of life, religion, private property, mind and offspring are the most salient of these goals. These are known as the indispensable necessities, for without them no society or legal system can meaningfully exist.

Once the *ratio* in analogical *qiyas* is identified and confirmed to be the *relevant* and *complete* common factor between the original and the new cases, very little else is involved in the transference of the legal norm from the former to the latter case. Analogy, however, is not the only method of inference subsumed under *qiyas*. Another important argument, among others, is that of the *a fortiori* type. For example, from Quran 5:3, "Forbidden unto you are carrion, blood, flesh of the pig," the jurists took the last four words to include all types of pork, including that of wild boar, although the original reference was to domestic pigs.

Another type of legal reasoning is *istihsan*, which is an inference that presumably starts from a revealed text but leads to a conclusion that differs from one reached by means of *qiyas*. If a person, for example,

forgets what he is doing and eats while he is supposed to be fasting during the month of Ramadan, *qiyas* dictates that his fasting becomes void, since food has entered his body, whether intentionally or not. But *qiyas* in this case was abandoned in favor of a Prophetic *hadith* which pronounced the fasting valid if the act of eating was the result of a mistake. The *qiyas* reasoning here is one that typically falls within a large area of the law where no exceptions are allowed. If fasting during Ramadan is broken on any given day, then *qiyas* requires compensation. Yet, despite the fact that *istihsan* is based on a text, the very choice of this text represents a juristic intention to create an exception to the law. If a mistake does not invalidate fasting, then no atonement or compensation is required.

Some, but by no means all, *istihsan* exceptions were justified by sacred texts. Many were in fact based either on consensus or on the principle of NECESSITY. For instance, to be valid, any contract involving the exchange of commodities requires immediate payment. But some contracts of hire do not fulfill this condition, a fact that would render them void if *qiyas* were to be invoked. The common practice of people over the ages has been to admit these contractual forms in their daily lives, and this is viewed as tantamount to consensus. As an instrument that engenders certainty, consensus becomes tantamount to the revealed texts themselves, thereby bestowing on the reasoning involved here the same force that the Quran or the *hadith* would bestow.

Likewise, necessity often requires the abandonment of conclusions reached by *qiyas* in favor of those generated by *istihsan*. Washing with ritually impure water would, by *qiyas*, invalidate prayer, but not so in *istihsan*. Here, *qiyas* would lead to hardship in view of the fact that fresh, clean water is not always easy to procure. The acceptance of necessity as a principle that legitimizes departure from strict reasoning is seen as deriving from, and sanctioned by, both the Quran and the Sunna, since necessity, when not acknowledged, can cause nothing but hardship.

A third method of inference is *istislah* (public interest), i.e., reasoning that does not appear to be directly based on the revealed texts. We have already taken note of the important role that public interest plays in determining the *ratio*'s suitability in *qiyas*. It is because of this relationship between the *ratio* and suitability that *maslaha* is deemed an extension of *qiyas*. As such, most theorists do not devote to it an independent section or chapter but treat it under the category of suitability. This fact attests to the heavy emphasis that *qiyas* places upon the non-literal extrapolation of rules.

On the basis of a comprehensive study of the law, the jurists came to realize that there are five universal principles that underlie the Shariʿa, namely, protection of life, mind, religion, property and offspring.

The reasoning was that the law has come down explicitly to protect and promote these five areas of human life, and that nothing in this law can conceivably run counter to these principles or to any of their implications, however remotely. If the feature of public interest in a case can be shown to be indubitably connected with the five universals, then reasoning must proceed in accordance with *maslaha*. The condition of universality is also intended to ensure that the interests of the Muslim community at large are served.

Legal pluralism

The foregoing interpretive methods constituted the tools of *IJTIHAD*, the processes of reasoning that the jurist employed in order to arrive at the best guess of what he thought might be the law pertaining to a particular case. Except for a relatively few Quranic and Prophetic statements which were unambiguous and which contained clear and specific normative rulings, the rest of the law was the product of *ijtihad*. For unlike the unambiguous textual rulings, which were certain and hence not susceptible to *ijtihad* (because the mind cannot see any other meaning in the language in which they were stated), this latter involved inferences, both linguistic and legal. *Ijtihad*, therefore, was the domain of probability.

Islamic law is therefore overwhelmingly the result of *ijtihad*, a domain of interpretation that rests on probability. Every accomplished jurist could exercise *ijtihad*, and no one knew, except for God, which *MUJTAHID* (the jurist conducting *ijtihad*) was correct. This relativity gave rise to the famous tenet and maxim that "Every *mujtahid* is correct."

Ijtihad also gave Islamic law one of its unique features. For every eventuality or case, and for every particular set of facts, there are anywhere between two and a dozen opinions, if not more, each held by a different jurist. In other words, there is no single legal stipulation that has monopoly or exclusivity, unlike the situation that obtains in the modern state. Islamic law is thus also characterized by legal pluralism, not only because it acknowledges local custom and takes it into serious account, but also because it offers an array of opinions on one and the same set of facts. This pluralism gave Islamic law two of its fundamental features, one being flexibility and adaptability to different societies and regions, and the other an ability to change and develop over time, first by opting for those opinions that have become more suitable than others to a particular circumstance, and second by creating new opinions when the need arose. That Islamic law was accused of rigidity by European colonialism to justify – as we shall see later – the dismantling of the Shariʿa system is therefore not only wrong but highly ironic.

Contents and arrangement of legal subjects

Muslim jurists viewed the Shariʿa as a mandate to regulate all human conduct, from religious rituals and family relations to commerce, crime and much else. The following is an overview of the contents and range of subjects treated in legal works, from short manuals to much longer treatises. These works tended to differ from each other in terms of the organization of their subject matter, although the chapters on ritual in these works always occupied first place and followed a fixed order (i.e., ablution, prayer, alms-tax, fasting and pilgrimage). The differences in the order of treatment of other legal spheres, at times great, can be attributed to the various ways the LEGAL SCHOOLS (to be discussed in chapter 3) conceived of the logical and juristic connections between one area of law and another, which is to say that the most significant organizational variations between and among these works can be attributed to school affiliation and the particular commentarial and interpretive tradition in each of them.

Generally, Muslim jurists gave the main topics of law the title *kitab* ("book"), e.g., the Book of Agency, which, in our modern organizational scheme, we recognize as a chapter. A sub-chapter was termed "*bab*," which would in turn be broken into a number of *fasl*s (sections).

Many jurists conceived of the whole of Islamic law as falling into four major fields, which were called "the four quarters," i.e., "rituals, sales, marriage and injuries." Each of these terms, used in this context metaphorically, stands for a staggering variety of subjects that belong to a single quarter. Thus, the "quarter of sales" would encompass, among many other subjects, partnerships, guaranty, gifts and bequests, while that of "marriage" would cover as varied a field as dissolution of matrimony, foster relationships, custody, and wifely and family support. In the same vein, the "quarter of injuries" includes homicide, the Quranic punishments and the laws of war and peace, among other topics. Works generally ended with what we term procedural law, supplemented by coverage of slave manumission. Other works ended instead with inheritance and bequests.

What follows is a schematic account of legal subject matter. It will be noticed that the main "book" topics are followed by percentages indicating the space typically allocated to the discussion of each topic in legal works. Obviously, works differed from each other in this respect, and so what are given here are rough estimates of space, intended to give a general idea of the quantitative weight of each subject in the overall coverage of the law. However, the legal works had much in common in

their proportionate coverage of the law. For example, the Book of Pledge, however short or long it is in various works, can never reach the magnitude of the Book of Prayer or that of Sales.

A. The First Quarter
   1. Book of Purity and Washing (7%)
   2. Book of Prayer (14%)
   3. Book of Alms-Tax (4%)
   4. Book of Fasting (3%)
   5. Book of Pilgrimage (6%)
   6. Book of Food and Drink (less than 1%) [some jurists discuss this and the following Book toward the end of the Third Quarter]
   7. Book of Hunting and Butchering Animals (less than 1%)

B. The Second Quarter

   [Some jurists treat these topics in the Third Quarter, with the exception of inheritance and bequests which are generally delayed to the very end of their works.]

   8. Book of Sales (4%)
   9. Book of Pledge (1%)
   10. Book of Insolvency and Interdiction (1%)
   11. Book of Amicable Settlement (less than 1%)
   12. Book of Transfer (less than 1%)
   13. Book of Guaranty (less than 1%)
   14. Book of Partnership (less than 1%)
   15. Book of Agency (1%)
   16. Book of Acknowledgments (1.2%)
   17. Book of Deposit (less than 1%)
   18. Book of Loans (less than 1%)
   19. Book of Unlawful Appropriation (1.5%)
   20. Book of Preemption (1%)
   21. Book of Sleeping Partnership (less than 1%)
   22. Book of Agricultural Lease (less than 1%)
   23. Book of Rent and Hire (2%)
   24. Book of Cultivating Waste Land (less than 1%)
   25. Book of Charitable Trusts (*WAQF*, 1.5%)
   26. Book of Gifts (1%)
   27. Book of Found Property (less than 1%)
   28. Book of Foundling (less than 1%)
   29. Book of Rewards for Returning Escaped Slaves (less than 1%)
   30. Book of Quranic Shares (inheritance, 3.5%)
   31. Book of Bequests (2.5%)

C. The Third Quarter

[Some jurists treat these topics in the Second Quarter.]

32. Book of Marriage (3.5%)
33. Book of Dower (1%)
34. Book of Contractual Dissolution of Marriage (*khulʿ*; less than 1%)
35. Book of Unilateral Dissolution of Marriage by Husband (2%)
36. Book of Re-marriage by the Same Couple (less than 1%)
37. Book of Husband's Oath not to have Sexual Intercourse with his Wife for Four Months (*ila'*; less than 1%)
38. Book of Husband's Oath not to have Sexual Intercourse with his Wife (*zihar*; less than 1%)
39. Book of Husband's Accusing his Wife of Being Unfaithful (less than 1%)
40. Book of Oaths (2%)
41. Book of Waiting Periods (1%)
42. Book of Foster Relationships (less than 1%)
43. Book of Family Support (1.2%)
44. Book of Child Custody (less than 1%)

D. The Fourth Quarter

45. Book of Torts (2%)
46. Book of Blood-Money (less than 2%)
47. Book of Quranically Regulated Infractions (5%)
    a. Sub-chapter on Apostasy
    b. Sub-chapter on Rebels
    c. Sub-chapter on Illicit Sexual Acts
    d. Sub-chapter on Accusing Someone of an Illicit Sexual Act
    e. Sub-chapter on Theft
    f. Sub-chapter on Highway Robbers
    g. Sub-chapter on Drinking Intoxicants
48. Book of Discretionary Punishments (*TAʿZIR*; less than 1%)
49. Book of War and Peace (*ǰIHAD*, 1.5%) [some jurists place this Book at the end of the First Quarter]
50. Book of Division of Booty (1%)
51. Book of Judges and Judgeship (3%)
52. Book of Suits and Evidence (1%)
53. Book of Testimonies (2%)
54. Book of Manumission (less than 1%)
55. Book of Manumission after Master's Death (less than 1%)
56. Book of Manumission for Payment (less than 1%)
57. Book of Female Slaves who had Children with their Master (less than 1%).