Sunnah, Qur'ān, ᶜUrf

R. B. Serjeant

In this paper I shall treat of the so-called "Constitution of Medina" and certain Qur'ān passages related to it, ᶜUmar's supposed letter to Abū Mūsā al-Ashᶜarī[1] on the office of *qāḍī,* Yemeni customary law codes on *manᶜah,* Bā Ṣabrayn al-Ḥaḍramī's *al-Manāhī al-rabbāniyyah* and other studies, drawing upon my researches completed and not yet completed. The two last named works have not yet been published[2] but I have been working on them for a numbers of years. I shall also refer to Aḥmad Oweidi al-ᶜAbbādī's Cambridge thesis *Bedouin law in Jordan* which Edinburgh University Press has agreed to publish. With Muslim theories on how *sharīᶜah* was formulated I am not directly concerned, but with the history of Arabian law that preceded the *sharīᶜah* and which, termed *ᶜurf* or *ᶜādah,* persists till today, apparently little changed in principle or practice since the pagan Jāhiliyyah age. From this ancient Arabian law branches off the Islamic *sharīᶜah* as a divergent, modifying and adding to it. The theory that Islamic law derives from the Qur'ān supplemented by the Sunnah, then *ijmāᶜ* consensus, and analogical reasoning *(qiyās),* does not reflect the initial historical circumstances of Islam.

First of all the notion of a break, a line separating the Jāhiliyyah from Islam is to be abandoned. Contemporary researches on the south Arabian inscriptions and indeed in Arabic literature itself show ever more clearly how unacceptable it is, and nowhere is this more evident than in the Sunnah. For the purposes of this paper a sunnah in its legal context may be defined as a legal decision taken by an arbiter in a case brought

[1] See my The 'Constitution of Medina', *Islamic Quarterly,* London, 1964, VIII, pp. 3-16; 'The *Sunnah Jāmiᶜah,* Pacts with the Yathrib Jews and the *taḥrīm* of Yathrib: Analysis and translation of the documents comprised in the so-called Constitution of Medina', *BSOAS,* London, 1978, XLI, pp. 1-42 (& Variorum reprint, 1981). 'The Caliph ᶜUmar's letters to Abū Mūsā al-Ashᶜarī and Muᶜāwiya' *JSS,* Manchester, 1984, XXIX, pp. 65-79 (& Variorum reprint, 1991). *Cambridge History of Arabic Literature* 'Early Arabic Prose', 1983, pp. 122-151. 'Materials for South Arabian history', *BSOAS,* 1950, XIII, part 2, pp. 589-93.

[2] The *manᶜah* codes are in the corpus of Yemenite material collected by the late Ettore Rossi and the Tarīm *Kitāb al-Ādāb wa-'l-lawāzim fī aḥkām al-manᶜah* upon which I am working. Bā Ṣabrayn's *al-Manāhī* in transcript I have begun to translate and annotate. See also E. Rossi, 'Il diritto consuetudinario delle tribù arabe del Yemen', *RSO,* Rome, 1948, XXIII, pp. 1-26.

before him that has become a precedent, a custom. One has to envisage a long series of arbiters before Islam, such an office being hereditary in certain noble houses, as noted in the literature.[3] The Prophet Muḥammad was an arbiter in this continuity of tradition and the theocracy he founded succeeded many others; it has been followed by numerous Islamic sub-theocracies if one may use such a term, within and without the Arabian Peninsula. In fact, so far from regarding Muḥammad as bent upon a policy of innovation, one has to conceive of him as born into a society regulated by a continuous series of sunnahs stretching from a remote past into the Islam of his day, and even beyond his supreme lordship of that theocracy.

A virtue of this system of case law is that a new sunnah may be established to replace an existing sunnah and in a sense the Prophet may be regarded as ratifying some sunnahs and replacing others – the changes were probably relatively few, but of course they are of premier importance. It may be a survival of the possibility of the modification or repeal of an earlier ruling in the practice continuing and inherited from the pagan age that al-Dārimī can cite a Tradition remounting to al-Awzāʿī[4] (88-157 H.): *Al-sunnah qāḍiyah ʿala 'l-Qur'ān wa-laysa 'l-Qur'ān qāḍiyah ʿala 'l-sunnah,* which I understand to mean that in the event of a conflict of law between the Qur'ān and the Sunnah, the latter is decisive. It is to be remarked that the two oldest *madhhabs* (regarded by the Sunnīs as heretical), the Ibāḍī and the Zaydī, make the Sunnah overrule the Qur'ān where there is conflict. Parallel to this, in Jordan of this century tribal law precedents are susceptible to modification, even replacement, by a properly qualified hereditary judge.

The *Fihrist*[5] notes that Hishām b. Muḥammad al-Kalbī (ob.206/821-2) composed a writing/book *(kitāb)* on what the pagan age (al-Jāhiliyyah) used to do and which accords with the judgement *(ḥukm)* of Islam. A

[3] Ibn ʿAbd Rabbi-hi, *al-ʿIqd al-farīd,* Cairo, 1359-72/1940-53, I, p.30 states that ʿAbdullah b. ʿAbbās wrote to al-Ḥasan b. ʿAlī when the people made him their ruler after ʿAlī: *Walli ahl al-buyūtāt tastaṣliḥ bi-him ʿashā'ira-hum,* Put men of noble houses in charge and through them you will make their tribes well affected (to you).

[4] *Sunan,* Dār Iḥyā' al-Sunnah al-Nabawiyyah, n.d., I, p.144. Al-Awzaʿī was the Imām of the Syrians especially.

[5] Ibn al-Nadīm, *al-Fihrist,* Cairo, n.d., p.147. Cf.Ibn Ḥabīb, *al-Muḥabbar,* Ḥaydarābād, 1361/1942, p.236.

pre-Islamic poet cited by Ibn Durayd's *Ishtiqāq*[6] as judging in the age of paganism, a judgement consistent with the Sunnah of Islam, is probably quoted from Ibn al-Kalbī's *Kitāb,* not now extant, but drawing no doubt on his father's data. It is of course the other way round – the Islamic Sunnah is inherited from the pre-Islamic era.

The Prophet Muḥammad was the scion of an honourable house, exercising a sort of theocratic control of the Ḥaram of Mecca, but himself of small political consequence. Falling out with his tribe, Quraysh, he found protection with the tribes of Yathrib/Medīnah who sought a neutral arbiter-leader to put an end to their quarrels. At Yathrib he built up a politico-religious ascendancy and in the course of his first year there he arranged two pacts that form part of the document inaptly known in Europe as the "Constitution of Medina". This is the first Islamic document that survives, elements of the Qur'ān apart.

My analysis of it lies before you, and I shall henceforth refer to it as the EIGHT DOCUMENTS of which it consists. The first two of the documents I identify as *al-Sunnah al-Jāmiᶜah,* the two first pacts of Year I which form a united Muslim community, *ummah,* the nucleus around which that community developed. The first document establishes a tribal confederation, basically security arrangements, the second adds supplementary clauses to it. The signatories to them have not been preserved, but since the *mu'minūn* and *muslimūn* of Quraysh and Yathrib are cited in the preamble it can be assumed that they were the Prophet's Quraysh followers from Mecca who had taken protection in Yathrib, and the chiefs, *naqībs* and *sayyids* og the Arab tribes of Yathrib. Even certain Jewish notables may have been included, but the Jews may have been represented by the Arab chiefs to whom they were allied in a secondary capacity as *tābiᶜūn.*

These two documents, the *Sunnah Jāmiᶜah,* are so sophisticated and well drafted that the existence of earlier models may be postulated, and it

[6] *Al-Ishtiqāq,* ed. ᶜAbd al-Salām Hārūn, Cairo, 1378/1958, pp. 389, 393. A case in point of a pre-Islamic *sunnah* reported by al-Bukhārī on the authority of ᶜĀ'ishah, is *nikāḥ al-istibḍāᶜ,* a form of marriage which Beeston identifies with a piece in the Sabaic text C. 581, where a surrogate father is involved. This also gives a different aspect to the maxim *al-walad li-'l-firāsh.* The institution of *istibḍāᶜ* by the third Islamic century, would doubtless be condemned by the *fuqahā',* whatever might in practice exist, as inconsistent with the *sunnah* of Islam. See my *'Zinā',* some forms of marriage and allied topics in Western Arabia' in the forthcoming Walter Dostal Festschrift.

so happens that Christian Robin and J.-François Breton[7] have discovered a Sabaic inscription at Jabal al-Lawdh in north-east Yemen which they describe as "le pacte de fédération des tribus". While there are uncertainties about the exact rendering of the inscription there can be little doubt about its general import. An approximate rendering into Arabic might be: *"Yawm aqāma kull qawm dh(u/a) Ilah wa-shaym wa dh(u/a) ḥabl wa-ḥumrah"*. When he (the *mukarrib*) organized (?)/joined together(?) every community group (Sabaic *gw*^{m}) of 'Il (God) and (possessed) of honour, and which has a pact and a writing in red. *Shaym* in colloquial Yemeni Arabic means "honour", *wafā, sharaf*[8] etc., and the Zaydī Imāms sprinkle red powder on documents, and the Prophet wrote on the red leather of Khawlān.

While the sense of the inscription is still speculative, the *ḥabl Allāh* (pact of God) of the Qur'ān, iii,103, in the verse *wa-'taṣimū bi-ḥabli 'llāhi jamīʿan wa-lā tafarraqū wa-'dhkurū niʿmata 'llāhiʿalay-kum idh kuntum aʿdā' wa-allafa bayna qulūbi-kum* is obviously the pact, the *Sunnah Jāmiʿah,* which put an end to tribal squabbles at Yathrib and founded the *Ummah.* No actual *ḥabl* on the lines of the *Sunnah Jāmiʿah* has yet come to light from pre-Islamic Arabia but one yet may – just as the rules for the pilgrimage at Itwat have been shown by Maḥmūd al-Ghūl[9] to resemble the *manāsik al-ḥajj.* But the establishment by Muḥammad of a confederation – the *Sunnah Jāmiʿah,* under theocratic rule was clearly an Arabian practice, well established.

The *Sunnah Jāmiʿah,* A, rules that each tribal group will deal with the major issue in tribal law, that of the responsibility for blood money (to which it adds ransom) according to *al-maʿrūf,* recognized custom. In this area of law the Prophet hereby gave positive sanction to *ʿurf* – indeed his general policy appears to follow existing custom. But the most significant proviso is in B,4. "In whatever thing you are at variance, its reference back is to Allāh, Great and Glorious, and to Muḥammad, Allāh bless and honour him". It is this clause that sets up the theocratic confederation headed by Muḥammad.

Following the Qur'ān verse quoted above, *sūrah* iii, 104, runs: "And let

[7] 'Le Sanctuaire préislamique du Gabal al-Lawḏ (Nord-Yemen)', *Comptes-rendus, Académie des Inscriptions et Belles-Lettres,* Paris, 1982, pp. 590-629, especially pp. 616-7.

[8] *Shaym* was thus defined to me by Sayyid Aḥmad al-Shāmī.

[9] 'The Pilgrimage at Itwat', *Proceedings of the Seminar for Arabian Studies,* London, 1984, XIV, pp. 33-41.

there be of you an *Ummah* (confederation) inviting to good and ordering what is customary/recognized *(al-maʿrūf)* and prohibiting what is unrecognized *(munkar)*". The question at once arises – with regard to both verses – did the Qur'ānic injunctions to "have recourse for protection to the pact *(ḥabl)* of Allāh as a collective group" and "let there be of you an *Ummah*" follow or precade the Prophet's concluding of the two pacts which are the *Sunnah Jāmiʿah?* It may be argued either way, but I think the *Sunnah Jāmiʿah,* A, preceded the Qur'ān verses, because the *ḥabl Allāh* as quoted in them appears to be something already in existence and they are giving it sanction.

The injunction to appeal in disputes to the Prophet as ultimate arbiter occur several times in the Qur'ān, but to the passage containing one of these injunctions that figures in *sūrah* iv,58-60, I did not give full consideration in my original study. This looks to reflect a development following, perhaps quite soon, the conclusion of *Sunnah Jāmiʿah,* B, to which it is related. Ommitting redundant phrases perhaps inserted at the Prophet's redaction, the passage runs: "Allāh commands you (plur.) to give back the pledges *(amānāt)*[10] to their owners, and when you judge between the people to judge with justice . . . O those who have trusted/believed *(āmanū),* obey Allāh and obey the Apostle and those of you in command, and if you dispute over something refer it back to Allāh and the Apostle". The Qur'ān then rebukes those maintaining they have trusted/believed in what was revealed to the Prophet but yet wish to take one another to the *Ṭāghūt* though ordered to disbelieve in him. The *Ṭāghūt,* called *al-kāhin al-Ṭaghūt* by Ibn Ḥabīb[11] is the pagan soothsayer-judge. "Those of you in command" will be the *naqībs* and sayyids of the Aws and Khazraj tribes.

I must digress a little to discuss this passage on pledges on which I hope to write a paper. In the legal procedure known as *munāfarah* or *nifār* the two contending parties each deposited an article with a judge. The loser also lost his plegde to the winner of the case. *Munāfarah* cases as reported

[10] Muhammad's Farewell Speech at the Ḥajjat al-Wadāʿ, repeats the injunction of Qur'ān, IV, 58-60: 'With whomsoever there is an *amānah* let him pay it back to him who entrusted him with it'. I regard the Speech as a dramatisation with a chorus, drawing largely on the Qur'ān. This injunction is given a general application, but cf. Qur'ān, ii, 283 which relates to a different situation.

[11] Ibn Ḥabīb *al-Munammaq,* Ḥaydarābād, 1384/1964, p. 111.

by Ibn Ḥabīb[12] appear to have an air of fantasy about them till it is realised that they are honour *(sharaf)* cases. Infringement of, or challenge to a tribesman's honour is a serious matter then and now and might even lead to a murder. So a *munāfarah* means much the same as a *muḥākamah*.[13] In Jordan[14] and Beersheba this century the loser's pledge went as a fee to the arbiter. A Yemeni Ms. on tribal law of not later than circa 500 H. which I am editing states: "When two litigants plegde a pledge with a trust worthy party *(thiqah)* and the case *(al-ḥaqq)* goes against one of them, the trustworthy party is allowed to retain the pledge until the party against whom the case has been decided acquits himself of his liability". My *Kitāb al-Ādāb wa-'l-lawāzim fī aḥkām al-manᶜah* (circa 1300 A.D.), of which more below, expatiates on this theme in the same vein. Al-Qurṭubī in *al-Jāmiᶜ li-aḥkām al-Qur'ān*[15] is only authority consulted by me who seems to interpret the passage correctly. He says the *amānāt* are articles deposited *(wadīᶜah)*, pledges *(rahn)*, etc. with governors *(wulāh)* and they are returned to their owners, the innocent and the guilty.[16]

[12] Ibid., p.94 passim. Cf. my 'The White Dune at Abyan: an ancient place of pilgrimage in Southern Arabia', *JSS*, XIV, 1971, pp. 74-83, a case over an accusation of bastardy.

[13] The Caliph ᶜUmar uses *muḥākamah* for Zuhayr's *munāfarah*.

[14] Ahmad ᶜUwaiḍi/Oweidi al-ᶜAbbādī, *Bedouin justice in Jordan*, Cambridge Ph.D. thesis 1982 (in press) & ᶜĀrif al-ᶜĀrid, *al-Qaḍā' bayn al-badw*, Jerusalem, 1933.

[15] Cairo, 1377/1958, V, p.256.

[16] I recall hearing in South Arabia that judges with whom litigants have placed a deposit are sometimes reluctant to return them to their owners after the case has been settled. It may have been to avoid this that the Qur'ān, IV, 68-60 was revealed or alternatively it was to abolish an existing custom of the judge taking the loser's pledge as a fee. In an honour case in *al-Munammaq*, p.107, a pledge is deposited with a third party not the *kāhin*-jugde. I found a pledge-holder *(ᶜadalī)* might be a person different from the arbiters ('Two tribal law cases' II, *JRAS*;London, 1951, p.161). *ᶜAdl*, meaning a deposit occurs in Qur'ān, II, 47, 123, the former quoting the *Sunnah Jāmiᶜah*, Doc.B, 3a, the latter also linked with it, as is Qur'ān, VI, 70. These passages might be dated to year 1 og 2. Weapons were used as a pledge in the Prophet's time (Ibn Hishām, *Sīrah*, ed. Saqqā et alii, Cairo, 1375/1955, II, p.55. I have noted, 'The White Dune at Abyan', *JSS*, Manchester, XVI, 1971, in an honour case, 15 muskets and 100 camels pledged before a sort of trial by ordeal. Perhaps honour cases come into Islam as *qadhf* cases. After the trial *lawm* money is paid over.

In an honour case immediately preceding Islam between the Bajīlah and Kalb tribes 'they made arbiter *(ḥakkamū)* al-Aqraᶜ b. Ḥābis and placed pledges *(ruhūn)* in the hands of ᶜUqbah b. Rabīᶜah b. ᶜAbd Shams al-Qurashī among the nobles *(ashrāf)* of Quraysh'. Each party when asked for a guarantor *(kafīl)* of fulfilment (*wafā*, of the judgement?) nominated several pagan gods where recent Ḥaḍramī documents in my hands nomi-

To return to the EIGHT DOCUMENTS – three shorter pacts deal with the client-ally relationships of the Jewish, and probably one Christian, tribes to the Arab Aws and Khazraj. With their disappearance from Yathrib-Medīnah these pacts have only historic interest and are unrelated to subsequent Islamic legislation on the status of the Jews in the Muslum community. Document G of the EIGHT is the treaty of mutual protection concluded before the so called battle of the Trench by the Muslim groups in Yathrib to which the Jews of Aws subscribed. Two documents that define the regulations for creating and regulating the sacred enclave, the Ḥaram, of Yathrib now named *Madīnat al-Nabiyy,* are important and valid, in principle, today.

To sum up, the *Sunnah Jāmiᶜah,* i.e. the EIGHT DOCUMENTS, A and B, are the basis, the founding charter, of the Muslim community, the *Ahl al-Sunnah wa-'l-Jamāᶜah,* laying down the principles for its unity and making it possible for others to join the *Ummah – man tabiᶜa fa-laḥiqa bi-him.* Muhammad is in this the *mujammiᶜ,* the uniter, probably like the *mukarribs* and others in Arabia before him.

It is astonishing that the ulema of the 2nd hijrah century onwards should have relatively neglected it – yet there are two clear quotations from it in the Qur'ān. I think other passages in the Qur'ān, if studied carefully, would be seen to reflect the *Sunnah Jāmiᶜah* and possibly others of the EIGHT DOCUMENTS. For instance *sūrah* II,40-48 I hold as adressed to the Jewish Banū Qurayẓah at the confrontation at al-Khandaq, the Trench, the last verse clearly couched in terms of the *Sunnah Jāmiᶜah* B & A. Phrases from the EIGHT occur in the great Tradition collections. If collected and studied the alterations or accretions to them in the course of transmission would emerge, and what is undeniably genuine would be established. (The EIGHT are patently genuine in themselves and, in contrast to the Qur'ān, show no sign of redaction). This might prove a corrective to what is over-destructive in the work of Goldziher and Schacht.

The *Sunnah Jāmiᶜah* remains a reference of central importance for at least a century and a half. The Prophet's death left the Medinan tribes in

nate Allāh as *kafīl. The Naḳā'iḍ of Jarīr and AlFarazdaḳ,* ed.A.A. Bevan, Leiden, 1905, I, p.140.

I noted from the late Sayyid Ṣāliḥ b. ᶜAlī al-Ḥāmid in Ḥaḍramawt: *Ṭaraḥū ᶜadā'il bayna-hum fī mā jarā,* They put down pledges between them over what had taken place. I.e. over an incident.

a quandary over his successor. A piece missing from the published text of Ibn Aʿtham's *Futūḥ,* but discovered by Miklos Muranyi,[17] provides valuable new information about the eventful meeting at the Saqīfah of the Banū Sāʿidah at which the problem was discussed. Ibn Aʿtham reports that Thābit b. Qays, orator of the Anṣār before and during the Prophet's time, stated that the Prophet "has gone out of the world without designating a particular man as successor and he entrusted the people to only such of the Qur'ān and the *Sunnah Jāmiʿah* as Allāh made (His) agent/trustee/guardian *(wakīl)* and Allāh will not unite *(yajmaʿ)* this *Ummah* on (the basis of) error". One has to consider the possibilities either that this statement was invented to refute the Shīʿah doctrine that the Prophet made a *naṣṣ* designating ʿAlī b. Abī Ṭālib as his successor, or that the Shīʿah historians such as al-Yaʿqūbī[18] deliberately excised it from their account of the Saqīfah. My own view is that the fundamental position of the *Sunnah Jāmiʿah* with regard to the *Ummah* meant that it would be in the minds of all present at the Saqīfah meeting. I regard the statement as authentic, and the Prophet's inaction on the issue of succession to himself as deliberate and for good reason – I hope to develop this theme in another paper.

The first major crisis in Islam came with the murder of the third Caliph, ʿUthmān, the conflict between ʿAlī b. Abī Ṭālib and Muʿāwiyah, the relation of ʿUthmān, their confrontation at Ṣiffīn[19] and the treaty of arbitration concluded between them in 36/656-57. This treaty consists of three brief and distinct agreements concluded at different times. The first rules that the arbitration will be made in accordance with the *Qur'ān alone.* The second adds *"wa-'l-sunnah al-ʿādilah al-jāmiʿah ghayr al-mufarriqah",* the just uniting sunnah, not the dividing sunnah, thus contradicting the first agreement. Why? My solution would be that the political leaders on either side would be more directly acquainted with the *Sunnah Jāmiʿah* with its clear cut provisos, than they would be with the Qur-ān – anyway the *Sunnah Jāmiʿah* is essentially a tribal confederal agreement though concluded under the aegis of Allāh. Again, following

[17] 'Ein neuer Bericht über die Wahl des ersten Kalifen Abū Bakr', *Arabica,* Leiden, 1978, XXV, pp. 233-60. A slight emendation has to be made (p.239, line 17). The second *inna-mā* should read *ilā mā.*

[18] Al-Yaʿqūbī, *Tārīkh,* Beirut, 1379/1960, II, p.123, alludes to Thābit b. Qays, the orator but states only that he mentioned the *faḍl* of the Ansār.
Ṭabarī, *Tārīkh,* II, I, p.508, Year 65, Qur'ān, III, 103, & *Sunnah Jāmiʿah* B, 2a.

[19] For my discussion of the Ṣiffīn arbitration documents see *CHAL,* I, pp. 142 seq.

the slaying of Ḥusayn, son of ᶜAlī b. Abī Ṭālib, at Karbalā', it is to the *Kitāb Allāh* and the Sunnah of His Prophet that al-Murrī appeals to avenge his death. This can only be the *Sunnah Jāmiᶜah,* not just a vague body of sunnahs. So the *Sunnah Jāmiᶜah* seems to be known variously as the *Sunnat Rasūl Allāh, Sunnat Nabiyyi-hi,* sometimes as the *Ḥabl Allāh.* The poet al-Farazdaq[20] says of the Umayyad Caliph Hishām: *"Ḥabl Allāh ḥablu-ka,* The pact bond of Allāh is your pact bond". By this is to be understood the protection afforded by Allāh's pact, i.e. the *Sunnah Jāmiᶜah.*

The *Sunnah Jāmiᶜah* continued important in Shīᶜah eyes and the Imām Jaᶜfar al-Ṣādiq defines it as consisting of 30 clauses – this exactly fits the length of the first three documents of the EIGHT, but includes document C which establishes the client-ally relation of the Jewish to the Arab tribes of Yathrib.

In the historical writing of the first Islamic century and a half it should be attempted to distinguish when the *sunnat al-Nabiyy/Rasūl* means the *Sunnah Jāmiᶜah,* the sunnah par excellence of the Prophet, and when it comes to mean, early no doubt, Muḥammad's sunnahs in general. In this connection I would draw attention to a study that has not received the attention it merits, M. M. Bravmann's *The Spiritual background of early Islam* (1972), notably the chapter "Sunnah and related concepts"; I concur in his refutation af Schacht's theory on the "Sunnah of the Prophet". Bravmann's discussion of the phrase *sunnat Rasūl Allāh wa-sīratu-hu* suggests to me a possible distinction between the *Sunnah Jāmiᶜah* and decisions made by the Prophet in a relatively routine way – but this requires further study.

It is strange that in the nine major works on Tradition covered by the Wensinck *Concordance et Indices* the term *Sunnah Jāmiᶜah* does not appear at all, although Muslim *(zakāt* 139) does quote: *A-lam ajid-kum ḍullāl-an . . . wa-mutafarriqīna fa-jamaᶜa-kum Allāh bī?* Dit I not find you in error . . . and split apart, then Allāh brought you together through me? Cf. Qur'ān,iii,103,supra. How could the Traditionists ignore so important a document?

The massive contingents of Arab tribesmen that moved into Syria and the cantonment cities of southern Iraq can hardly have had recourse to other than their existing arbiters and chiefs in legal matters and the

[20] A.A. Bevan, *The Naḳā'iḍ of Jarīr and AlFarazdaḳ,* Leiden, 1905-08, II, 1013. The verses are an important indication of the attitude of the time to the sunnah.

inherited tradition of the pagan age. The *Waqʿat Ṣiffīn*[21] indeed says that at the time of the *fitnah* between ʿAlī and Muʿāwiyah: "they were Arabians *(ʿurb)* . . . and in them were the vestiges of (tribal) honour *(ḥamiyyah)*". This looks like an understatement! *ʿUrf* administered by the chiefs no doubt varied from tribe to tribe but it is likely to have been *ʿurf* law, given in time an Islamic tag, that formed the basis of Islamic *sunan*. This is not, of course, to deny that certain sunnahs do remount to the Prophet.

An example of how little Islam might affect tribal customary law even towards the close of the 3rd century appears when the first Zaydī Imām, al-Hādī,[22], arrived in the Jawf of north-east Yemen to find "immoral women" at the Sultan's gate. One of them had received money from a soldier (i.e. a tribesman) with others present, but when she failed to go to him the soldier took the case to the Sultan who punished her and compelled her to go to him.

Let me now turn to the celebrated letter which the Caliph ʿUmar is credited to have sent to Abū Mūsā al-Ashʿarī, his governor in Iraq, which I have examined in detail in the *JSS*, 1984. When reading it with undergraduates I had doubt about its authenticity like earlier scholars. Eventually I happened upon a letter in Ibn Abī Ḥadīd's commentary to the *Nahj al-balāghah* which ʿUmar is stated to have written to Abū Mūsā. Stripped of its obviously much later preamble, it is identical both in content and diction, given minor variations not materially affecting the sense, with a letter ʿUmar sent to Muʿāwiyah, his governor of Syria. Of the genuineness of the letters I am in no doubt. Let me quote the letter to Muʿāwiyah:

> Stick to four practices and your conduct *(dīn)* will be sound and you will attain your most abounding fortune.
>
> 1. When two opposing parties present themselves, you are responsible (for seeing to the production of) proofs, witnesses of probity and decisive oaths.
> 2. Then admit the man of inferior satus *(daʿīf)* so that his tongue may be loosened and his heart emboldened.
> 3. Look after the stranger, for when he is long detained he will abandon his suit and go back to his people.
> 4. Take pains to arrive at conciliation *(ṣulḥ)* so long as judgement is not clear.
>
> Peace be upon you.

[21] Al-Minqarī, *Waqʿat Ṣiffīn*, Cairo, 1382 (ed. ʿAbd al-Salām Hārūn).

[22] See my 'The Interplay between tribal affinities and religious (Zaydī) authority in the Yemen', *al-Abḥāth*, Beirut, 1982, XXX, pp. 11-50 quoting the *Sīrat al-Hādī*, Beirut, 1392/1972, p.94.

The virtually identical letter to Abū Mūsā al-Ashᶜarī I believe to be the basis of the famous letter ascribed to ᶜUmar, expanded and "improved" by Abū Mūsā's descendants from the simple concise message neglected by early Islamic scholars. Such evidence as there is would make the "improved" letter not later than the first two decades of the second century of the hijrah. But it was not accepted by all early scholars and the Spanish Ibn Ḥazm rejected the letter as not genuine. I favour Bilāl b. Abī Burdah, Abū Mūsā's grandson, as the likely "improver". The "improved" version inserts instruction for which there is no basis in the original letters and it alters the general purpose of certain clauses in the genuine letter. It opens with the assertion that "Pronouncing judgement *(qaḍā')* is an established practice", which from the scant evidence available seems contrary to ᶜUmar's commendation of Zuhayr's statement that the three methods of deciding a case, are oath taking, summoning before a judge *(nifār)* or proof. But the most significant principle fathered on ᶜUmar reads: "Pay attention to comprehending what . . . has no Qur'ān or practice *(sunnah)* applicable to it, and become acquainted with similarities and analogies. Then after that compare matters. Then have recourse to that which is most preferable to Allāh and most in conformity of them to justice/right *(ḥaqq)* as you see it". Though not ᶜUmar's letter and not to be regarded as reflecting actual practice in the first century, it is a sound basis for an Islamic theory of law.

The formulation of Islamic law as we know it took place in Iraq, the Holy Cities, even Ṣanᶜā'. A sampling of the eleven volume *Muṣannaf* however, written by the 2nd century ᶜAbd al-Razzāq al-Ṣanᶜānī, does not seem to reveal material divergencies from the Iraqīs and Ḥijāzīs. The *fuqahā'* of those countries display a prejudice against a number of aspects of tribal custom. The "improved" letter of ᶜUmar very significantly relegates conciliation *(ṣulḥ)* to a secondary place – a subtle change from ᶜUmar's ruling. At this point I should like to quote *in extenso* from Colonel Aḥmad Oweidi's interpretation of the bedouin – I would say "tribal" – attitude in Jordan to law. It seems to me to embody the principles lying behind the customary law known as *manᶜah* to which I shall come later in this paper, but I think it would also reflect the tribal outlook in 6th and 7th century Arabia. The importance of *ṣulḥ*, conciliation, in the scheme of tribal society, to which in a sense *qaḍā'* emerges as secondary, is plain to see.

"Justice cannot prevail until any imbalance caused by a violation of the limit of acceptability (Oweidi means by this, the tribal moral feeling) is resolved in such a way as to bring all the parties back within it. Hence the verdicts of a Bedouin judge must satisfy all parties concerned, and restore them to the recognized limit of acceptability – *kull min-hum yarjaᶜ li-ḥadd-uh* – everyone should return to his position within the limit of acceptability. This is so because the most important link binding Bedouin communities together is that of extended kinship and the concept of the limit of acceptability. Conciliation, *ṣulḥ,* and the satisfaction of all parties concerned, is essential to preserve balance and equilibrium. Since the limit of acceptability is flexible, differing according to time, place and the individual community, Bedouin justice varies likewise. A sentence is gradually implemented and modified until the line of equilibrium is once again reached to the satisfaction of all, and only then is it considered that justice has been achieved. A Bedouin judge would sentence a culprit to the most severe punishment. Then mediators beg the injured party for forgiveness – in a series of mediations the judge, the head of the community and the injured party, all gradually mitigate the sentence until the punishment becomes minimal. The process restores both the culprit and the injured party to their previous positions with the limit of acceptability and each *rijaᶜ li-ḥadd-uh.*"

Let me just say that in 1947 a tribesman who had been inciting his son to fire at me, was brought before the Wāḥidī Sultan and the Arab political assistant advised me to plead for mitigation of his sentence, and others did likewise. Though threatening with arms is a serious offence in tribal law the man was let off with perhaps a day's imprisonment.

The *fuqahā'* clearly dislike *qasāmah,* the oath taken by 50 men of the kin of the accused, but which I have shown is standard procedure among the south Arabian tribes today.[23] Yet another issue on which the *fuqahā'* have acted, modifying the milder attitude taken by the Prophet, is the question of *zinā,* fornication – on which I have written a paper (in press). Ṭabarī[24] quotes Ibn ᶜAbbās as saying of the Arabs of the Jāhiliyyah: 'They used to forbid such adultery *(zinā')* as appeared, but to allow what was hidden, saying, 'concerning what appears it is disgrace *(lu'm)* but as for what is hidden, that does not matter'. The entirely different attitude of tribes from what became *sharīᶜah* law on *zinā'* has been discussed in Walter Dostal's excellent paper on *'Sexual hospitality' and the problem of matrilinearity in Southern Arabia.*[25]

[23] 'Dawlah, tribal shaykhs, the Manṣab of the Waliyyah Saᶜīdah, *qasamah* in the Fạdlī Sultanate, South Arabian Federation', *Arabian studies in honour of Mahmoud Ghul,* Wiesbaden, 1989, p.147.

[24] *Tafsīr,* Cairo, 1321, V.14.

[25] *Proceedings of the Seminar for Arabian Studies,* London, 1990, pp. 17-30.

Ibn al-Mujāwir[26] (7th/13th century) reveals the actual law prevailing in western Arabia of his day in a most important statement. "All the ᶜArab of these provinces, the mountains along with the Tihāmahs up to the borders *(ḥudūd)* of the Ḥijāz – not one accepts the judgement *(ḥukm)* of the *sharᶜ* – and they only assent to the *ḥukm al-manᶜah*. There is no doubt that it is the judgement of the Jāhiliyyah to which they used to go with one another to court *(yataḥākamūn)* at the *kāhins*". To judge by Colonel Oweidi's study this is likely to have been the case also in the rest of western Arabia as far, at least, as Jordan.

Manaᶜa[27] means – to defend from injustice, tyranny, attack, transgression, and *manᶜah* is the verbal noun derived from it. The Prophet was *fī sharaf/ᶜizz wa-manᶜah,* honoured and protected – i.e. as a member of an arms-bearing tribal house. *Manᶜah* is that body of customary law which governs the maintenance of security. It covers a multitude of sides of tribal life but not business or market law, and non-arms-bearers only in their relation as protected persons to tribesmen. There is emphasis on anything touching on tribal honour. *Ṣulḥ* is stated to come before all other judgements *(aḥkām)*.

One of the Mss. I have edited but not yet published is attributed to Ibn Zinbāᶜ whose name, but little else, is known to Yemenis. Much of the Ms. is derived from what the illustrious qāḍī al-Ḥusayn b. ᶜImrān b. al-Fāḍil (correctly al-Faḍl) al-Yāmī wrote of the book of *al-Manᶜ,* comprising all the categories of it and the arbiters of *manᶜ* before it. Sayyid Aḥmad al-Shāmī pointed out to me that ᶜImrān b. al-Faḍl was a well known supporter of the Ṣulayḥids. The Yāmīs supported the Ḥāfiẓī Daᶜwah of the later Fāṭimids, as ᶜAbbās al-Hamdānī informs me. Al-Ḥusayn would have composed his treatise ca. 500 H. but drew on earlier arbiters, perhaps, indeed probably, remounting to the age of paganism.[28] *Manᶜ* at any rate was followed by al-Ḥusayn and probably his father in Ṣanᶜā', where he was governor, but it is not connected with Ismāᶜīlism.

Al-Ḥusayn's dictum maintains that 'the judge must judge by the *sharᶜ* in its relation to *(min)* the *sharᶜ,* and by *manᶜ* in that to which *manᶜ* pertains. He should also judge by *siyāsah* (shrewdness, diplomacy?) in

[26] *Tārīkh al-mustabṣir,* ed. O. Löfgren, Leiden, 1951-54, p.99.

[27] *Tāj al-ᶜarūs,* Kuwait, 1405/1985, XXII, pp. 218-9, *manᶜ* is *al-haylūlah bayna* and *al-ḥimāyah; manaᶜa-hu nāsun . . . yamnaᶜūna-hu min al-ḍaym wa-'l-taᶜaddīᶜalayh* and *wa-maᶜa-hu man yamnaᶜa-hu min ᶜashīrati-hi.*

[28] The tribal *sijills,* may have contained Manᶜah law. Hamdānī alludes to a pre-islamic *sijill.*

accordance with his ability to make an independent judgement *ʿalā qadr ijtihādi-hi)*'. Like the later Shāfiʿī author of *al-Ādāb . . . fī aḥkām al-manʿah* (supra) he sees no inconsistency between *manʿ* and *sharʿ*. I do not indeed think there is a conflict in principle between the *Sunnah Jāmiʿah* of the Prophet which federates the Yathrib-Medīnah tribes, and *manʿ*, yet I was told that when Imam Yaḥyā came on treatises such as these he would destroy them and execute the possessor.

It will be appreciated that *manʿah* law has only limited applications to urban communities which in any case would fall within the category of protected persons of tribes resident and dominating in a city. Tarīm for example during last century was ruled by three separate groups of Yāfiʿī tribesmen who domineered over the town's artisans and others, whom they despised. ʿAlawī b. Ṭāhir[29] tells of the ʿAmūdī Mashāyikh of his native Dawʿan that Allāh has empowered the tribes over them and they have become *raʿiyyah* to the extent they cannot marry any of their daughters without their permission. They had other humiliating rights *(ḥuqūq)* also.

In tribal customary law, *manʿah* apart, practices diametrically opposed to *sharīʿah* obtain – I do not deny of course that some *manʿ* customs may not conform to Islam. The most commonly cited is that women may not inherit land, etc. In Tarīm I even came across a treatise which allowed a woman to make over to a male relative by *nadhr* the share she should inherit under Islamic law – compliance being thus made with *sharīʿah* while tribal custom was preserved.

Certain of these customs[30] were severely censured by the late 19th century Ḥaḍramī writer Bā Ṣabrayn. 'One of the most horrible things', he says, 'is what is well known of the *bādiyah* (tribesfolk of Dawʿan

[29] *Kitāb al-Shāmil fī tārīkh Ḥaḍramawt,* printed in Singapore in 1940 but not published, p.182.

[30] Many un-Islamic practices existed up to modern times in other parts of Arabia, but the Saʿudis have followed a deliberate policy of suppressing them; other Arab states seem to have followed suit. H.R.P. Dickson reports (1920): 'Ibn Saud assured me that so ignorant had the Bedouin of Nejd been in the past that, until the new revival ninety per cent of them had never heard of religion, marriage had never been solemnized and circumcision had been unknown'. *The Arab Bulletin,* Cairo, 1919, IV, p.110, reprint with notes by Robin Bidwell, Gerrards Cross, 1986. An attack on un-Islamic customs in the Yemeni Tihāmah was made by ʿAbdullah b. Sulaymān b. Ḥamīd al-Najdī, *Naṣīḥat al-Muslimīn ʿan al-bidaʿ* . . . ed. Muḥammad Sālim al-Bayḥānī, fifth printing, Fatāt al-Jazīrah Press, Aden, 1372/1935.

province), that the fornicator *(zānī)* comes to the wife of another man, and such as the husband happens upon the two of them, but does not kill them both, or does not kill him. On the contrary he says to him: *'Artabiṭ ʿinda-hā fī miyah wa-ʿishrīn riyāl'*, the sense being I shall not release you until you undertake to pay me that amount (120 *riyāls*) and I shall divorce her, for example – and he does so'. The adulterer, called *al-marbūṭ*, has to pay the injured husband double the *daf* marriage present, but not the *mahr* dower (which a man does not normally pay over unless he divorces) and double all the marriage expenses, two thirds going to the injured husband and a third to the woman's family *(ahl al-ḥurmah)*.

The *Ādāb wa-lawāzim al-manʿah* interestingly enough also details regulations governing marriage by capture.

Bā Ṣabrayn attacks many other practise current in Ḥaḍramawt in his day, notably those relating to agriculture and the *zakāt* on crops. He categorically condemns the compromise between customary law and the *sharʿ* which, I think, had evolved centuries before. 'One of the most disgraceful of forbidden things,' he says, 'is belief that judgement by reason, deriving from the means of cultivation *(asbāb al-ḥirāthah)*, commerce *(tijārah)*, tribalism *(qabwalah)* and the handicrafts *(ḥiraf)*, contrary to the judgement/law of the *sharʿ*, branches out from *(mufarriʿ ʿalā)* the judgement of the *sharʿ*. What accords with the judgement of the *sharʿ* is called *ḥukm sharʿī* or *sharʿī*, and what conflicts with it is called *ḥukm farʿī* or *farʿī* and is recognized because of its being branching out, according to belief about it (?), from *sharʿī*. The truth and rightness (of the matter) is that what accords with the judgement of Allāh, the Almighty Ruler, is the judgement of the *sharʿ;* anything contrary to that is the judgement of the false *Ṭāghūt*. Calling falsity truth is forbidden like calling truth falsity. So take heed!' *Ḥukm* is to be understood as 'law', and the *ḥukm farʿī* is not the Islamic *furūʿ*. In Jordan Aḥmad ʿUwayḍī (thesis, 219) has described the *quḍāt al-furūʿ*, dealing with cases related to particular crafts, trades and professions, e.g. land, cattle, horses. These obviously had no training in *sharīʿah* law and no doubt followed the custom pervading their bedouin ambience.

So Bā Ṣabrayn condemns 'the *Ṭāghūt* judges *(ḥukkām)* of the Dayyin (federation), the Bā Ḥanḥan', specialising in agricultural disputes, running tribal law courts as they were doing in 1967 and probably do today. The Marāqishah of the Faḍlī sultanate told me in 1964 that 'their own procedure was preferable (to the *sharīʿ-ah* courts) because it was plea and counter-plea in one day and judgement in one day and payment settle-

ment in one day' because of the interminable delays, etc. of *sharīʿah*.[31] For this and other reasons I think tribesfolk everywhere prefer customary lawcourts or individual judges. Nevertheless I do not think *sharīʿah* law is entirely disregarded in tribal districts and *ṣulḥ* is certainly common procedure in towns – but then as the ancient proverb says: *Al-Ṣulḥ khayr/sayyid al-aḥkām,* Conciliation is the best/lord of judgements.

[31] 'Dawlah, tribal shaykhs . . .', p.142.